151 U.S. 164

RECORD, CASE NO. 15354.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 970.

MARSHAL TUCKER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JULY 22, 1893.

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in the case of United States vs. Marshall Tucker, indicted for murder.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, November term, A. D. 1893.

UNITED STATES
vs.
MARSHAL TUCKER. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Marshal Tucker, on the 15th day of September, A. D. 1892, at the Choctaw Nation in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of Lula May, a white woman and not an Indian, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said Marshal Tucker, with a certain gun, then and there charged with gunpowder and one leaden bullet, which said gun he, the said Marshal Tucker, in his hands then and there had and held, then and there feloniously, willfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Lula May, and that the said Marshal Tucker with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Marshal Tucker discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound her, the said Lula May, in and upon the left side of the head of her, the said Lula May, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Marshal Tucker, in and upon the left side of the head of her, the said Lula May, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said
2 mortal wound she, the said Lula May, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Marshal Tucker, her, the said Lula May, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 62. United States vs. Marshal Tucker. Murder. A true bill. Clyde C. Patton, foreman. Witnesses: Wm. Wilson, South McAlester, I. T.; Lillie Ibison, South McAlester, I. T.;

Fanny Orwig, South McAlester, I. T.; Minnie Strong, South McAlester, I. T.; Benj. Walls, Fanshaw, I. T.; Ed. T. Spriggs, South McAlester, I. T.; Will Neal, Jenson, Ark.; Belle Wilson, South McAlester, I. T.; Tennie Wilson, South McAlester, I. T.; W. O. Wolverton, So. McAlester, I. T. Filed in open court, Nov. 26, 1892. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

3 *Record Entries.*

In the circuit court of the United States for the western district of Arkansas, November Term, 1892, Saturday morning, 8½ o'clock, Nov. 26, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* MARSHALL TUCKER. } Indictment for murder. No. 620.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified, and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

Whereupon by agreement of parties it is ordered by the court that this cause be and the same is hereby continued to the next term of this court and set down for trial February 23, 1893.

FEBRUARY TERM, 1893, *Tuesday, Feb.* 21, 1893.

(Caption omitted.)

On this day come the defendant by his attorney and files his application in writing verified upon oath praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Pink Hooper, Crocket Lee, Walter Hughes, and George Hughes, in behalf of said defendant, be paid by the United States and that a subpœna be issued for them returnable February 23, 1893.

4 THURSDAY, *March* 9, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Wm. M. Cravens, esq. and J. B. Forrester, esq.; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause; and that he has also been served with a full

and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge, under the law, the following were selected for the trial of this cause, to wit: Thos. A. Conden, Elisha Dobbs, Thos. O. Gann, Wm. K. Hughes (West Fork), Zachariah W. Murphy, Sherrod Merritt, Thos. W. Pollard, Jacob R. Raper, Isaac T. Stringfield, Isaiah Wilkerson, Wm. J. Williams, James H. Smith. Twelve good and lawful men of the district aforesaid duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause they were put in charge of a sworn bailiff of
5 this court. And it is further ordered by the court that the marshal of said district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

FRIDAY, *March* 10, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Cravens and Forrester; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court: Thos. A. Conden, Elisha Dobbs, Thos. O. Gann, Wm. K. Hughes (West Fork), Zachariah W. Murphy, Sherrod Merrit, Thos. W. Pollard, Jacob R. Raper, Isaac T. Stringfield, Isaiah Wilkerson, Wm. J. Williams, James H. Smith, who took their seats in the jury box and, after hearing the balance of the evidence, by agreement of counsel each side, was allowed four hours for the argument of the case; and, after hearing a portion of the argument of counsel and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

On motion of the district attorney it is ordered by the court that an attachment be issued for Will Neal, returnable forthwith, and directed to the marshal of Oklohoma, to bring the body of the said Neal before this court to answer for contempt in failing to appear as a witness in this cause when duly summoned thereto.

SATURDAY, *March* 11, 1893.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H.
6 Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs Cravens and Forrester; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court: Thos. A. Conden, Elisha Dobbs, Thos. O. Gann, Wm. K. Hughes (West Fork), Zachariah W. Murphy, Sherrod Merrit, Thos. W Pollard, Jacob R. Raper, Isaac T. Stringfield, Isaiah Wilkerson, Wm. J

Williams, James H. Smith, who took their seats in the jury box, and after hearing the balance of the argument of counsel and receiving the charge of the court retired in charge of the sworn bailiff aforesaid to consider of verdict.

SUNDAY, *March* 12, 1893.

(Caption omitted.)

Court convened, after having taken a recess on Saturday, to receive the verdict of the jury in the case of United States vs. Marshall Tucker, charged with murder. Present, the honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

(Caption omitted.)

And now comes the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Wm. M. Cravens, esq., and J. B. Forrester, esq.; and now comes the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Thos. A. Conden, Elisha Dobbs, Thomas O. Ganu, Wm. K. Hughes (West Fork), Zachariah W. Murphy, Sherrod Merritt, Thomas W. Pollard, Jacob R. Raper, Isaac T. Stringfield, Isaiah Wilkerson, Wm. J. Williams, James H. Smith, who returned into court
7 the following verdict, to wit:

"We, the jury, find the defendant guilty of murder as charged in the within indictment.

(Signed) "I. T. STRINGFIELD,
"*Foreman.*"

Whereupon, on motion of defendant, by his attorneys, the jury was polled, and each juror answered for himself that the verdict as read by the court was his verdict.

Whereupon the jury was discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

WEDNESDAY, *March* 15, 1893.

(Caption omitted.)

Ordered by the court, that two attachments issue for Will Neal, one directed to the U. S. marshal for the west. dist. of Texas, and the other to the U. S. marshal for Colorado, returnable forthwith, to bring the body of the said Neal before this court, to show cause why he should not be punished for his contempt for failing to appear as a witness in this cause, when duly summoned thereto.

MONDAY, *March* 20, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his motion to set aside the verdict of the jury and for a new trial in this cause.

SATURDAY, *April* 15, 1893.

(Caption omitted.)

On this day come the defendant, by his attorney, and files his affidavit in support of his motion for a new trial in this cause.

8 SATURDAY, *April* 29, 1893.

(Caption omitted.)

On this day come on for final hearing the motion heretofore filed by the said defendant, to set aside the verdict of the jury and for a new trial in this cause, and the court, being well and sufficiently advised in the premises, doth overrule the same. To which said ruling of the court the defendant at the time excepted.

9 SATURDAY, *April* 29, 1893.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Marshall Tucker, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 12 day of March, 1893, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the marshal of the district aforesaid cause the said Marshall Tucker to be taken hence, and him, the said Marshall Tucker, safely and securely keep from the date hereof until Wednesday, the 12th day of July, A. D. 1893, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Marshall Tucker to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Wednesday, the said day of July, in the year of our Lord one thousand eight hundred and ninety-three, cause the said Marshall Tucker to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

10 SATURDAY, *April* 29, 1893.

(Caption omitted.)

Ordered by the court, that the said defendant have until June 1st, 1893, to file his bill of exceptions herein.

MAY TERM, 1893. *Saturday, June* 10, 1893.

(Caption omitted.)

On this day, on motion of the defendant, it is ordered by the court that defendant have further extension of time to June 20, 1893, to perfect his appeal herein.

MONDAY, *June* 19, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorney, Wm. M. Cravens, esq., and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And the defendant also files his assignment of errors, and petition for writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

TUESDAY, *June* 27, 1893.

(Caption omitted.)

On this day come the clerk of this court and makes known that a writ of error, taking this cause to the Supreme Court of the United States, has been issued by said clerk in this cause.

It is therefore ordered by the court, that execution of sentence heretofore pronounced in this cause be stayed, pending the action of the Supreme Court.

11 *Bill of exceptions, filed June* 19, 1893.

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
MARSHAL TUCKER, DEFENDANT. } Murder.

Be it remembered, that on the trial of the above-entitled cause the Government, to maintain the issues on its part, offered the testimony of the following witnesses: Lillie Ibison, Fannie Orwig, William Wilson, Miss Belle Wilson, Tenie Wilson, statement of ass't dist. att'y in regard to Witness Neal, who each testified as follows:

12 LILLIE IBISON, having been duly sworn upon behalf of the Government, was examined by Mr. William M. Mellette, assistant district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Lillie Ibison.

Q. Where do you live?

A. I have been living in Webb City since I was here before the grand jury, but I guess I will remain in town after the trial.

Q. Where were you last September?

A. I was living in South McAlester.

Q. Do you know Marshal Tucker, the defendant?

A. Yes, sir.

Q. Did you know a woman by the name of Lula May?

A. Yes, sir; I did.

Q. Is she alive or dead?

A. She is dead.

Q. What did she die from?

A. Well, I guess——

Q. What was the cause of her death; did she die a natural death?
A. No, sir; she was shot.
Q. You say she is dead?
A. Yes, sir.
Q. How long had you known her before her death?
A. Well, the first time I met Lula it was either the last of July or the first of August, and I won't say positive which.
Q. Last August?
A. Yes, sir.
Q. What was she, a white woman or an Indian?
A. She was a white woman.
Q. Now, where were you living last September; in what direction from South McAlester?
A. Well, I could not say what direction it was.
13 Q. How far from the court-house or how far from the town?
A. Between half a mile and three-quarters, I guess.
Q. How far from Old McAlester?
A. They call it a mile, I believe.
Q. It was between the two towns, was it?
A. Yes, sir.
Q. When was Lula May killed?
A. On the 15th of September, I think.
Q. Of last September?
A. Yes, sir.
Q. In what nation was that?
A. Choctaw Nation.

The COURT:

Q. Where did she locate this place of killing?
Mr. MELLETTE. She said it was b'tween South McAlester and Old McAlester. (To the witness.) Which side of the track was it?
A. It was on this side.
Q. Towards Krebbs or the other side?
A. Yes, sir; towards Krebbs.
Q. That is what side of the track; the east side?
A. Yes, sir; I believe it is.
Q. It was on the side of the track towards Krebbs?
A. Yes, sir.
Q. The same side that Old McAlester is on.
A. Yes, sir.
Q. Which side of the Choctaw road was it on?
A. It was on this side of the Choctaw road.
Q. Towards Fort Smith?
A. Yes, sir.
The north side?
A. Yes, sir.
The ASSISTANT DISTRICT ATTORNEY. You say it was on the 15th day of September last she was killed?
A. Yes, sir.
Q. What time?
A. Between the hours of 8 and 9 o'clock at night.

Q. At night.

A. Yes, sir.

14 Q. I wish you would go ahead now and tell the jury all you know about her death.

A. Well, the defendant, Marshal Tucker, came to Lulu Mays's house on the fifteenth of September, between the hours of 8 and 9 o'clock, and demanded entrance into the house. He said, "Open up." Lulu said, "Who is it," and he says, "It is Marshal Tucker," and he says, "Open up," and she says, "I have company," and he says, "Open up," and she says, "I have company, I can not let you in," and he says, "Open up, or I will open it for you," and she called to Fannie, a young lady that was in there, staying in the house, and said, "Fannie, would you open the door," and she said, "Yes," but before she could get to Lulu she was laying in the floor dead.

Q. How was that now; Lulu said what to Fannie?

A. She said, "Would you open the door."

Q. She said to Fannie, "Would you open the door?"

A. Yes, sir.

Q. And what did Fannie say?

A. Fannie said, "Yes," and before Fannie could get to her she was laying on the floor dead.

Q. The shot was fired before Fannie got to her?

A. Yes, sir.

Q. How was Lulu May standing at the time she was shot?

A. She was standing stooping over.

Q. Where, at the door?

A. Yes, sir; standing at the door; she had hold of the door knob. The door was locked.

Q. Did you know Marshal Tucker?

A. Well, yes; I was not, to say, personally acquainted with him, but I knew him as Marshal Tucker. He had been up there several times.

Q. He had been at the house several times?

A. Yes, sir.

Q. Did you know who it was before he told who it was?

A. I knew his voice.

15 Q. Did you hear anybody else talking out there, any other voice?

A. Well, I suppose that when Marshal taken the revolver out of his pocket there was a young man standing out there, Willie Wilson, as I found out after I went out of doors; he said to him, "Marshal, don't."

Q. Did you hear him say that?

A. Yes, sir.

Q. You heard somebody out there say, "Marshal, don't"?

A. Yes, sir.

Mr. CRAVENS (of counsel for defendant). Did you hear that?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Do you know whether Marshal Tucker was acquainted with Lulu Mays or not?

A. Yes, sir; I think he was.

Q. Had he ever been in her company?

A. Yes, sir; he was in her company one time; the only time I knew of, coming from Krebbs. We had been there, over to Krebbs, and in coming back——

Q. You were all together?

A. Yes, sir; I, Lulu, and a hack driver, and Mr. Tucker.

Q. There was two of you, and Marshal Tucker, and a hack driver?

A. Yes, sir.

Q. And you say he had been up at that house several times?

A. Yes, sir.

Q. Was that while Lulu Mays was living there?

A. Yes, sir.

Q. You say before Fannie could get to the door you had heard previous to that time somebody out there say, "Marshal, don't"?

A. Yes, sir.

Q. And then after Lulu asked Fannie if she would open the door, Fannie said, "Yes," and what did Fannie do?

A. She got up and started to the door.

16 Q. Before she got there the shot was fired?

A. Yes, sir.

Q. When the shot was fired what became of Lulu Mays?

A. She fell dead on the floor.

Q. Did she say anything?

A. She said, "God have mercy!" as she hit the floor. That was the last words she said.

Q. About where was she shot?

A. She was shot right about there [indicating on left side of head, pretty well in front].

Q. Did the ball come out?

A. No, sir; we never seen the ball at all; the' looked for the ball next day; they could not find it, and they said they supposed it must have went down in her neck somewheres.

Q. Who were in the house at that time?

A. There was I and Fannie Orwick and her little boy, about 7 years old.

Q. Now, after Lulu had fallen on the floor what was done?

A. Fannie run to the door just as soon as she could get to it, threw the door open, and ran out in the yard, and said, "O, Marshal! for God's sake don't shoot any more; you have killed Lulu."

Q. Where were you at that time?

A. I hadn't got out of doors yet.

Q. Where did you go?

A. I went right out behind Fannie, as quick as I could get the child out of the room; I *taken* hold of the child's hand and led it out.

Q. What did you see out there?

A. There was Marshal Tucker and Willie Wilson standing there.

Q. Where was Marshal?

A. There was a water barrel setting around here at the corner of the house, and he was standing on the other side of the water barrel.

Q. Now, what occurred after you went out there?

17 Mr. CRAVENS (of counsel for defense). I don't understand that.

Mr. MELLETTE. She says there was a water barrel at the corner of the house.

Mr. CRAVENS (of counsel for defendant). Was it at the right or left?

A. It was to the right of the door, I suppose.

A. He was standing there?

A. Yes, sir; he was standing a little beyond the barrel.

The ASSISTANT DISTRICT ATTORNEY. How do you mean?

A. That way [indicating in front of her] from the barrel.

Q. Where was Wilson?

A. Wilson was standing behind him.

Q. In behind Tucker?

A. Yes, sir.

Q. How far was Marshal Tucker from the door?

A. Well, I suppose he was about three steps, I guess.

Q. About three steps from the door?

A. Yes, sir.

Here court took a recess until 1:30 o'clock p. m.

18 AFTERNOON SESSION, 2:15 o'clock p. m.

Continuation of the direct examination of Lillie Ibison:

The ASSISTANT DISTRICT ATTORNEY. Now, you state that you went out of the house; that Fannie Orwick went out and said, "O, Mr. Tucker, don't shoot; you have killed Lulu," and you went out behind her?

A. Yes, sir.

Q. And that Marshal was standing off about three steps from the door, and Wilson was behind him?

A. Yes, sir.

Q. Now, from there go ahead and state what occurred.

A. Well, Fannie, after she stepped out, he says, "Who is that?" He says, "Is that you, Fannie?" and she says, "Yes," and he says, "Give me your hand, old girl," and he says, "Now, you can go," after he shook hands. I started up to him and he says, "Don't come to me, or, God damn you, I will shoot you," is the very words that he said. He had the gun in his hand—the revolver—up this way, and Willie Wilson pushed him one way, and——

Q. How did he have his pistol?

A. In his right hand.

Q. Up this way?

A. Yes, sir; Willie Wilson pushed him one way and pushed me the other.

Q. What did you do then?

A. We went over to South Town ——

Q. You left there, did you?

A. Yes, sir; we went over to South Town.

Q. Left the woman lying in the house dead?

A. Yes, sir; we went over to Old Town, I should say.

Q. Did you go back in the house at all?

A. No, sir; I never was in the house any more.

19 Q. You went over to Old McAlester, then, did you?

A. Yes, sir; we went over there and over to Mr. Tom Shellburn's place, where he staid over there; he had a saloon there, or something, I guess it was, and he was not at home.

Q. Who was Tom Shellburn?

A. He is a deputy marshal; and we went over to the man's house that run the hotel, and he was not there; and we came on over to another hotel and we found Mr. Shellburn there, and we told him about it; and then we went on over there to where he stopped over there—where he had this billiard hall, whatever it was—and then we went on out to Mr. Bullard's and staid the rest of the night.

Q. When did you go back to the place?

A. Next morning about—I could not say—a little after six o'clock, I think.

Q. Did you find anybody there when you got there?

A. Yes, sir; there was Joe Ottersan, a young man from Krebbs, and two or three men from South McAlester; I don't know who they were, and one young fellow from South McAlester.

Q. There was one man you don't remember——

A. Yes, sir; I know his name but I can not think of it.

Q. Where was the body of the woman who was killed?

A. It was lying on the cooling board.

Q. There in the house?

A. Yes, sir.

Q. How many rooms did that house have?

A. One.

Q. Just one room?

A. Yes, sir.

Q. Did it have any other door except that one?

A. No, sir.

Q. Just one door?

A. Yes, sir.

Q. How many windows?

A. Two.

Q. Did you have a light in the house at the time this thing occurred?

A. Yes, sir.

20 Q. Did you have the light burning?

A. Yes, sir; we left the light burning.

Q. Where was Wilson when you came out of the house?

A. He was standing in behind Marshal Tucker.

Q. Were they still there when you left?

A. Yes, sir; we left them there.

Q. You don't know what became of them?

A. No, sir; I do not.

Q. You say Wilson pushed you one way and Mr. Tucker the other?

A. Yes, sir.

Q. And then you ran off or left?

A. Yes, sir.

Q. Was Wilson armed?

A. No, sir; he wasn't that I se'n; he was in his shirt sleeves.

Q. Did Marshal say anything when you went out that you remember of, that you have not told about? Did he do anything? Did you see Marshal Tucker do anything?

A. Yes, sir; he walked up to the door, right in front of the door.

Q. Where was she lying, the dead woman?

A. In the house.
Q. Did he say anything then?
A. He says, "I have done it."

Cross-examination by Col. W. M. CRAVENS:

When was it that Lulu Mays was killed?
A. I think it was on the 15th day of September, one night.
Q. What day of the week was it?
A. Saturday night.
Q. Saturday night, the 15th of September?
A. Yes, sir.
Q. How long had you been acquainted with Miss Lulu at that time?
A. Well, I met her in Fort Smith the first time I ever met her here, either the last of July or the first of August, I could not say which.
21 Q. Was that the same year—last year?
A. Yes, sir.
Q. This killing was last fall, was it not; the fall of 1892?
A. Yes, sir, 1892.
Q. You became acquainted with her in the July or August of last year?
A. Yes, sir; I won't say positive which.
Q. Where was she living at that time?
A. South McAlester.
Q. Where did she live at the time you got acquainted with her?
A. She was living in South McAlester; she was here as a witness.
Q. Do you know what case?
A. In the Robert Hall murder case.
Q. What was he charged with?
A. Killing Jim Yates.
Q. Killing him at her house, wasn't he?
A. Yes, sir.
Q. And that is when you got acquainted with her?
A. Yes, sir.
Q. Did you live at South McAlester then?
A. No, sir; I lived here then.
Q. How long did you live here?
A. I have lived here for about 7 years, to the best of my knowledge.
Q. When did you go to McAlester?
A. I went with her.
Q. When she returned after that trial you went with her?
A. Yes, sir.
Q. When was that, now?
A. Well, it was in August, I think. It was in July or August one, and I won't say which, for I have forgotten.
Q. It was after the Robert Marshal Hall trial?
A. Yes, sir; after the trial.
Q. Do you know how long it was after that trial?
A. Well, it was in September.
Q. Well, I mean before you went up there; how long did she remain here after the trial?
A. Only one day is all.
22 Q. Where did you meet with her here?
A. I met with her here in the court-house.

Q. Were you a witness in that case?

A. No, sir; I was not.

Q. You were a witness attending court?

A. No, sir; I wasn't. We had been keeping boarders down here, and there was some of the witnesses owing us some, and I was trying to get the board money.

Q. You were up here collecting bills?

A. Yes, sir.

Q. Where were you keeping boarders?

A. Right down here on the corner in this old building out there.

Q. Did you live with her all the time after you went up there with her?

A. Yes, sir.

Q. At the time of your going up there, before you went up there you had not met with Marshal Tucker; you never saw him?

A. No, sir.

Q. You never saw him until you went up there, which was in August, I believe?

A. Yes, sir.

Q. Now, this killing took place the 15th of September, 1892?

A. Yes, sir.

Q. Can you give us the time you went up there, about what time in August?

A. No, sir; I can not for I do not know, but it was the day after the conclusion of the Marshal Hall trial.

Q. You say the place where you lived out there was north of South McAlester?

A. I don't know which way it was. It was between South town and Old McAlester. I could not say which way it was for I was turned around there myself.

Q. How far about was it from South McAlester? About halfway out between the two places, was it?

A. It was between half a mile and three-quarters out from South McAlester.

Q. Did the place have any name out there?

A. Well, it is called the Hill, is about all I know about it.

23 Q. What kind of a hill?

A. "Chippy" Hill, I guess.

Q. It was called "Chippy" Hill, was it?

A. Yes, sir.

Q. Were there any other houses out there besides Lulu's?

A. Yes, sir; there were five more.

Q. Of the same kind?

A. Yes, sir; there wasn't anyone else living up there but her, though.

Q. There wasn't only the one house there?

A. All the houses were there, but there was nobody living in them.

Q. Only one house occupied at that time?

A. Yes, sir; that is all.

Q. Nobody kept the other house?

A. No, sir.

Q. She had one room?

A. She had one room, and then she had a cook room, and my room, was all the houses up there.

Q. I thought there was only one room in the house?

A. There was only one room in the house, but there was six houses on the hill, and I had a room and she had a cook house, and there was her room, but there was not but one room in each house—in each building.

Q. Where was your room?

A. This way from her room.

Q. How far off from her room?

A. I could not say; not very far.

Q. As far as across the street, or further?

A. No, sir; a good deal further than that.

Q. Was it as much as a quarter of a mile?

A. No, sir.

Q. 100 yards?

A. I could not say, for I never measured it.

Q. You had a room up there?

A. Yes, sir.

Q. Off some distance from hers?

A. Yes, sir.

Q. At her place there was only her room and a cook room?

24 A. There was only her room, just her room alone, and the cook room was off from her room; just one room to the house; didn't have but one room to it.

Q. The cook room was some distance away?

A. Yes, sir.

Q. Where did you get your meals?

A. Down at the cook house, or kitchen.

Q. At her cook house?

A. Yes, sir.

Q. Where did you sleep?

A. Up in my room.

Q. By yourself?

A. Yes, sir; part of the time, and part of the time down with her.

Q. Wasn't you afraid to sleep up there by yourself?

A. No, sir.

Q. You were not afraid?

A. No, sir.

Q. You were not afraid to sleep off up there by yourself amongst these Indians?

A. No, sir; I was not.

Q. How old are you?

A. Growing on 19.

Q. How long on this night had you been at Miss Lulu's?

A. I had been there from the time I went there—I don't know how long it was; I didn't keep account of the weeks.

Q. I mean on the night of the killing? You say you didn't live there, you had a room of" some distance where you staid and slept; how long had you been this day or night down at her house?

A. The houses were all there together; we were there together all the time.

Q. The houses were not together, were they?

A. No, sir; the house' were not together, but we were together the biggest part of the time.

Q. What time did you go down there? This was on Saturday
25 night, the 15th of September; what time did you go down there on Saturday, or Saturday night?

A. I had been there all day, off and on with her. The houses were all right there together and everything.

Q. Had you ever seen Marshal Tucker before that night?

A. Yes, sir.

Q. Where?

A. I seen him up there.

Q. Now, at what place?

A. Up there on the hill, at Lulu's house; up there where I staid.

Q. You never saw him up at your house?

A. Yes, sir; he was at my house once or twice, I won't say which. He was there one evening I know, and I won't say positive whether he was there any more or not.

Q. Was he over there to make any arrest of anybody?

A. No, sir; not that I know of. I didn't ask him of course, what he was after or nothing of the kind. That wasn't any of my business; that was his business.

Q. That was not any of your business?

A. No, sir.

Q. Before that had you ever seen Mr. Billie Wilson, as you call him?

A. Yes, sir; I had seen him before, too.

Q. Where did you get acquainted with him?

A. He came up there on the hill. He was up there several times.

Q. He was frequently up there, was he not?

A. Yes, sir.

Q. At your house and Lulu's, too?

A. No, he never was in my room at all. When he came up there he always staid down at cook house or up in Lulu's room.

Q. Who ran the cook house?

A. We had a cook there, a man named Barney Dorris?

Q. He was the cook?

A. Yes, sir.

26 Q. Where is he now?

A. I do not know where he is; I heard awhile back he was in Denison, Texas.

Q. He is not here?

A. No, sir.

Q. Was he there that night?

A. Yes, sir.

Q. He was there?

A. Yes, sir; he was down in the cook room asleep.

Q. How do you know that he was down there asleep?

A. Because we left him there.

Q. What time?

A. When we went up to her room.

Q. Was he sleeping when you went up there?

A. No, sir; he was not, but he was fixing to go to bed.

Q. What time did you leave to go up to her room?

A. I don't know what time it was; it was sometime after dark, though; I did not have any clock or nothing; we had a clock up there; it was not running, and of course I could not tell the time.

Q. Had you seen any other gentlemen before you went up there that night before this shooting took place?

A. There was two young men there that night before we went up to the other room?

Q. Who were they?

A. Ben Walls and Fred Wiggington.

Q. Where were they when this shooting took place?

A. They had been gone about half an hour.

Q. Had they not just left before this noise was made at the door?

A. No, sir; they had been gone half an hour or maybe more.

Q. Had they gone off before dark?

A. No, sir; they came up before 6 o'clock; they didn't stay there very long.

Q. Did they come before or after dark?

A. Well, about 6 o'clock.

Q. I don't know anything about what time that comes.

27 A. I don't either.

Q. I am talking about dark; I go by the sun.

A. I usually go——

Q. What were you going by?

A. It was after sundown when they left there.

Q. Was it not after sundown when they came?

A. Well, I don't know; it was about 6 o'clock, though, when they came; I don't know whether it was after sundown; I would not say that.

Q. You didn't have any clock there; what makes you think it was about 6 o'clock?

A. What makes me say that, because we had heard the whistles and things blowing for 6 o'clock; that is why I say it.

Q. Before they came?

A. Yes, sir; before they came.

Q. Was it not after dark when they left?

A. Yes, sir; it was after dark; I said it was after dark when they left.

Q. How long after dark?

A. They had been gone about half an hour; I don't know how long after dark, but they had been gone about half an hour——

Q. I am not asking you that; I asked you how long after dark.

A. I tell you I can not tell you that; it was after dark when they left.

Q. As much as half an hour after dark?

A. Yes, sir; I guess it was.

Q. Was it not an hour?

A. No, sir; it was not an hour.

Q. You are certain of that?

A. Yes, sir; I am certain; if I was not certain of it I would not tell you that.

Q. You think it was between half an hour and an hour?

A. No, sir; I don't think anything about it; it was about a half an hour after they left when this killing commenced.

28 Q. How long after dark, I asked you?

A. Oh, my——

Q. You can tell that; you know they had been gone half an hour.

A. They had been gone half an hour when the killing commenced.

Q. What is that that fixes it in your mind? My information is they had just gone out.

A. I don't know anything about your information at all.

Q. That is the reason I am putting these questions to you.

A. I suppose it is; but then they had been gone about half an hour when the killing commenced.

Q. Isn't that the fact—they *they* had just gone out and were out there close by?

A. No, sir; it is not; they had been gone about half an hour when the killing commenced.

Q. Didn't they go out and stop out there?

A. No, sir; they didn't.

Q. How do you know they didn't?

A. Because I saw them go away.

Q. You watched them in the dark, did you?

A. I saw them go away all right.

Q. How far did you see them away?

A. I seen them leave the house enough to know they were gone.

Q. Don't you know they stopped out there behind some trees?

A. No, sir; there was no trees in the direction they went.

Q. Which way did they go?

A. They went over towards Old Town.

Q. You are certain they had been gone half an hour?

A. Yes, sir; about half an hour.

Q. How far away from the house were they when you saw them last?

29 A. I don't know how far it was; I didn't go out and measure it, or step off the ground, or nothing of the kind, and therefore I don't know how far it was.

Q. You could measure it by your eyesight; you have got good eyes?

A. I guess so; they never have failed me yet.

Q. Now, by your eyesight——

A. I didn't try to measure with my eyesight.

Q. Did you try to measure at all?

A. No, sir.

Q. Were they as much as ten steps from the house when you saw them?

A. I said I seen them far enough—I saw them far enough to know they were gone.

Q. Were they as much as 100 yards away?

A. I don't know; I didn't measure the ground, and I could not say.

Q. Were they as much as 50?

A. I don't know; I won't say, for I do not know.

Q. They were in their shirt sleeves, too, were they not?

A. No, sir.

Q. They had on their coats, did they?
A. Yes, sir; they both had on coats.
Q. How long did they stay there?
A. I don't know just how long they did stay there. They staid a right smart little bit.
Q. What business had they?
A. I could not tell you that, my friend. I don't know. I don't know what business they had there.
Q. They didn't want to stay all night, did they?
A. I did not ask them what business they had, or nothing of the kind; I did not think it was worth while.
Q. They didn't ask to stay all night, did they?
A. I guess if they had asked to stay all night they would have got to stay.
Q. Were they pretty good looking fellows?
A. They wasn't ugly men.
Q. Did they have any money?
30 A. I never went in their pockets to see whether they had any money or not.
Q. Did they show any money?
A. Yes, sir; they set up a bottel of orange cider; I guess they must have had a little money, as much as 50 cents.
Q. Was that the only kind of cider they got?
A. They had some crab-apple cider.
Q. They got two bottles of cider?
A. No, sir; but one bottle of cider; I say they kept some crab-apple cider and orange cider there.
Q. I asked you if they got anything else but the orange cider?
A. No, sir; they did not.
Q. Were they armed?
A. I could not say. I didn't examine the men to see whether they were armed or not.
Q. You didn't examine them?
A. No, sir; I wasn't studying about their being armed.
Q. You didn't feel around them to see whether they had guns on them?
A. No, sir.
Q. You didn't see any guns?
A. No, sir.
Q. Did you see any weapons at all they had?
A. No, sir; they had no weapons at all I seen.
Q. If they had any you did not see them?
A. No, sir; I did not. If I had looked for them and they had had any, I guess I would have found them, but I didn't look for them; I wasn't studying anything about them at all.
Q. Were they officers?
A. Yes, sir; that is what they said they were.
Q. What, officers?
A. Deputy marshals for this court.
Q. For the Fort Smith court?
A. Yes, sir.
31 Q. Tha' was Walls and Wiggington?

A. Yes, sir.

Q. Were they white men or Indians?

A. Mr. Wiggington was a white man, and I don't know whether Mr. Walls claims to be an Indian or not. I could not say what he is, but he looks to me like he was a little Indian; of course, I don't know anything about that, but Mr. Wiggington was a white man.

Q. Had you seen him before?

A. Yes, sir; I had seen him before a time or two.

Q. Had you ever seen Walls before?

A. Yes, sir.

Q. Now, Tucker had never been at your house, I believe you say?

A. Yes, sir; he was at my house once, in my room, and he had been up on the hill several times.

Q. When he was up on the hill several times, were you down to Lulu's room or house?

A. I was at Lulu's the biggest part of my time.

Q. But you slept up at the other house?

A. Yes, sir; I did a part of the time, and part of the time I slept there with Lulu.

Q. What was the first thing that attracted your attention that night after these two deputy marshals, Walls and Wiggington, left?

A. Mr. Tucker at the door, of course.

Q. What was the first thing you heard outside?

A. The first I heard outside Mr. Tucker came to the door demanding entrance.

Q. Did you hear the walking outdoors before that, or not?

A. No, sir; of course not, for we all were sitting there talking, and was not thinking about anybody coming up, and therefore we were not listenning.

Q. Now, then, what was the first that you heard?

A. The first that I heard was him demanding entrance at the door.

Q. What did he say?

A. He said, "Open up."

32 Q. Was there any answer made to that?

A. Yes, sir.

Q. What was the answer?

A. Lulu said, "Who is it?"

Q. What did he say?

A. He said, "It is Marshal Tucker."

Q. He gave his name, did he; you are certain of that?

A. Yes, sir; I am certain of it; if I wasn't I would not set up here and swear to it.

Q. How long since you had seen the defendant before, the last time you saw him before?

A. I don't know how long it had been since the last time I seen him until that night.

Q. You never saw him, I believe you said, until you went up there; you didn't know him down here?

A. No, sir; I did not know there was such a man at all down here.

Q. When Lulu asked him who it was he said it was Marshal Tucker?

A. Yes, sir.

Q. Now, what next was said?

A. He asked her to open the door again. He said, "Open up." And she told him she had company, and she would not let him in.

Q. She says, "I have company, and I wont let you in."

A. Yes, sir.

Q. What next was said?

A. He said, "Open up."

Q. He kept saying, "Open up?"

A. Yes, sir; he said it the third time.

Q. What next?

A. After he said it the third time, the third time he said, "Open up, or I will open it for you."

Q. Tell us what was next after that.

A. There was a pistol fired, and Lulu fell on the floor dead.

Q. After he said, "Open it up, or I will open it for you,"
33 then the pistol fired?

A. Yes, sir.

Q. When you went outside after the pistol fired, this other lady that was in the house went out of the door first?

A. Yes, sir.

Q. The door was not open when the gun fired?

A. No, sir; it was closed and locked.

Q. What was that other lady's name?

A. Fannie Orwick.

Q. She went out first, and then you gathered up Lulu's child?

A. No, sir; not Lulu's child—Fannie's child; I took him by the hand; I didn't gather him up.

Q. You led him out?

A. Yes, sir.

Q. Was the child asleep?

A. If he had been asleep I could not have led him out.

Q. I thought you might have waked him up.

A. I don't suppose he would have been standing there in the floor asleep; I don't think I would. You don't stand and sleep, do you?

Q. You must excuse me——

A. Yes; I expect you deserve excusing.

The ASSISTANT DISTRICT ATTORNEY. He does not have any children, and does not know anything about how they sleep.

The WITNESS. I don't know about him having any children; I expect he has been the father of some children, though.

Mr. CRAVENS (of counsel for defense). The child was standing up, was he?

A. Yes, sir.

Q. How old is the child?

A. About 7 years old, I think.

Q. Where is it?

A. He is at old McAlester.

Q. When you went out Marshal was standing back beyond the barrel, the water barrel?

A. Yes, sir.

Q. And Billy Wilson behind him?

A. Yes, sir; that is what I say.

34 Q. And now, how far was Marshal from the door?

A. About three steps.

Q. Wilson was about 10 feet behind him I believe you said?

A. I didn't say a thing about how far he was from him; he was standing in behind Tucker, and I didn't say how far it was.

Q. I thought you said that.

A. No, sir; you didn't think I said any such a thing, for I didn't say it.

Q. I will ask you now to tell me how far.

A. I don't know; I never measured how far it was he was standing in behind him; he was standing there, and that is all I can say.

Q. Did you measure the distance between Tucker and the door?

A. It was about three steps, I guess.

Q. You measured that?

A. No, sir.

Q. How could you tell me that?

A. I don't know—I know, too, but I didn't measure the steps at all. It was about three steps, though, to where Marshal was standing.

Q. Could you not just as well tell me how far Marshal and Wilson were apart as to tell me the other?

A. No, sir; I could not, for I never noticed. He was standing in behind Tucker, though, and that is all I could say.

Q. Did Marshal go in the house after you went out?

A. No, sir; he did not.

Q. How far was Miss Lulu from door when she was shot?

A. She was standing right at the door.

Q. Against the door?

A. No, sir; not standing against the door.

Q. What was she doing?

A. She was standing there and had hold of the door knob; she had been talking to Marshal.

Q. Did the door open in or out?

A. On the inside of the house.

Q. The door opened on the inside?

A. Yes, sir.

35 Q. Whereabouts was the shot in the door—did you notice, or not? How far was it from the door knob?

A. Well, about 15 or 18 inches from the door knob, I guess—no, not that far.

Q. Was it in the door shutter?

A. Yes, sir; it was in the door, I said.

Q. In the door?

A. That is what I said.

Q. How far was it from the door knob?

A. I don't know how far; I won't say, because I don't know.

Q. Was it the length of this pencil, or longer or shorter?

A. It was a little longer than that pencil.

Q. Was it above or below the door knob?

A. Above the door knob.

Q. Right over it?

A. No, sir; kind of slanting from the door knob.

Q. Were there any steps on the outside?
A. Yes, sir; three steps on the outside of the door.
Q. Plank steps?
A. Yes, sir; led up to the door.
Q. Led up to the door?
A. Yes, sir; they were not rock or anything of that kind; they were plank steps.
Q. Marshal was not on those when you went out?
A. No, sir; I didn't say he was on the steps; I said he was standing in behind the water barrel.
Q. About three steps from the door?
A. Yes, sir.
Q. What was Wilson doing when you went out?
A. He was standing in behind Marshal Tucker.
Q. Was he saying anything or doing anything?
A. No, sir; he was not.
Q. As soon as you went out you went right off, didn't you?
A. No, sir; I didn't.
36 Q. You didn't go back in the house, did you?
A. No, sir.
Q. Where did you go?
A. We staid there a few minutes, and went to Old Town. We did not leave right immediately at all.
Q. You just staid there a few minutes?
A. Yes, sir; I don't know how long it was; it was not very long.
Q. You say that Wilson had on no coat at all?
A. He did not have on any coat at all.
Q. Did Tucker have on a coat?
A. Yes, sir.
Q. Wasn't that a pretty cool night?
A. Oh, not so very cool; I have seen warm nights, and I have seen cooler nights than that was.
Q. You had the door shut up?
A. Yes, sir; we had the door shut up.
Q. Did you have the windows down?
A. Yes, sir.
Q. Did you have any fire?
A. No, sir; we didn't.
Q. You had a lamp lighted, you told the district attorney, in the house?
A. And we did have the lamp lit in the house; we would not be sitting in there without a lamp lighted.
Q. When Miss Lulu fell, where did she fall?
A. She fell right back from the door; her head was about that far [indicating] from the stove. Her head come pretty near hitting the stove.
Q. How near were her feet to the door?
A. I don't know; they were tolerable close to the door; I don't know just how close they were; they were close to the door.
Q. Take this space between these two tables here for the opening in the door as you would go into that door from the outside, did the shutter open back to the right or left?
A. The door opened back to the right as you go in.

Q. Where was the stove?

A. It was setting right about here [indicating].

37 Q. To the right of the door?

A. Yes, sir; to the right of the door; right out in front of the door.

Q. In front, and to the right?

A. Yes, sir.

Q. How far from the door?

A. I don't know how far it was; I never measured it.

Q. Her head was near the stove?

A. Yes, sir.

Q. And her feet near the door?

A. Yes, sir.

Q. Were her feet nearer this part of the door?

A. Her feet was near the door; her feet was near the piece that is on top of the door.

Q. Say the open space of the door is here, the door would open back that way to the right, the hinges would be over here——

A. No, sir; the hinges were on the other side.

Q. It must open to the left, then?

A. No, sir; it opened this way—you are building that house now; I am not.

Q. No; I want you to build it.

A. I don't know anything about building houses.

Q. I just want to find out how it was; you have been there and I have not.

A. I will tell you as near as I can; and if that don't do, you will have to go down and find out.

Q. You said it opened back to the right as you went in?

A. It did.

Q. And the stove was off to the right?

A. Yes, sir.

Q. Now, her head was out at the stove?

A. Yes, sir.

Q. I want to know if the door opened back that way, if the hinges would not be over here?

A. I don't know where they would have to be; they would have to be on the door, I suppose.

38 Q. I guess so. Were her feet next to the side of the door towards where the hinges were, or towards the other side of the door?

A. Towards the other side of the door.

Q. And close to the door?

A. Yes, sir.

Q. And her head was out yonder towards the stove?

A. It was over towards the stove; the stove was not out yonder; it was here.

Q. What was the size of that house?

A. I don't know anything about the size. It was no great big house, or no very small one. I never thought to have anybody measure it or I would have measured it and come down and told you. I don't know just how large it was.

Q. You staid there sometime?

A. Yes, sir.

Q. You have an idea, have't you?

A. No, sir.

Q. It wasn't as big as this one, was it?

A. No, sir; I guess it wasn't quite as big as this one.

Q. If her feet were close to the door, and close to this side of the door next to where it shut, how was it they could push the door open and see her in there?

A. We opened the door.

Q. Did you move her feet behind the door?

A. I didn't open the door; I don't know what Fannie done. She ran to the door and opened it I don't know whether she moved Lulu's feet or left them lying where they were.

Q. If her feet were next to the door, and close to this side of it, it couldn't open very far back without coming against her feet?

A. I didn't open the door; I don't know—if I had opened it I would have known.

Q. The door was not opened clear back, was it?

A. Yes, sir; I don't know where Fannie moved her feet or what she done, but the door was opened clear back, and she is the lady that opened the door.

39 Q. What sort of a pistol was it that Marshal Tucker had when you went out?

A. It was a large pistol.

Q. Did he have a scabbard and belt on?

A. I don't know; I never looked to see whether he had any scabbard or belt, or what you call it, on at all. I never looked, for I was not studying about the scabbard and belt; I was studying about getting away from there before I got killed myself.

Q. He threatened to kill you, did he?

A. Yes, sir.

Q. Did you ever have any trouble with him?

A. No, sir; none at all.

Q. You were friendly with him, were you not?

A. Yes, sir; I was a little friendly with him wh'n I met him; I never had anything against Marshal.

Q. Was he drinking that night?

A. I don't know whether he was drinking or not. He acted funny; I don't know whether he was drunk or not.

Q. You don't know whether he was drunk or not?

A. No, sir; but he didn't talk much like a drunk man. I don't know whether he was drunk or not.

Q. He appeared to have use of his faculties?

A. I don't know what he had use of, but he didn't talk like a drunk man.

Q. Why didn't he kill you?

A. I don't know why he didn't kill me. I was not supposed to know why he didn't kill me at all.

Q. Did anybody prevent him from killing you?

A. Mr. Wilson pushed him off one way and me the other.

Q. He would likely have killed you if it had not been for William Wilson?

A. I guess so.

Q. William Wilson was your protector?

A. He was at that moment.

40 Q. He was your f'iend, too, was he not?

A. I never had anything against him; I don't know whether he had anything against me or not; if he did he never said anything about it.

Q. He had been frequently up there to that house?

A. Yes, sir.

Q. You and he had played together?

A. No, sir.

Q. He was a friend of the house, was he not?

A. I don't know whether he was a friend of the house or not.

Q. He brought customers up there to the house, did he not?

A. No, sir; he never did.

Q. He didn't?

A. No, sir; if the customers wanted to come they come without anybody fetching them, and if they didn't they could stay away.

Q. He wasn't running for the house?

A. No, sir; he was supposed to be a nice young man. I guess he was not running around for any such a house as that.

Q. He was supposed to be a nice young man, was he?

A. Yes, sir; he was as far as I knew.

Q. You never had any business with him yourself?

A. No, sir; I never did.

Q. When did you next see Wilson after that?

A. I next saw him down here at Fort Smith.

Q. You didn't see him up there the next day?

A. No, sir; he wasn't up there that I saw.

Q. You are friendly to him, are you not?

A. I have got nothing against him.

Q. You are not friendly to Tucker, are you?

A. I have not got anything against Mr. Tucker at all.

Q. I will ask you if your feelings are not unkind, unfriendly,

41 against Tucker; do you say they are not?

A. I did not say.

Q. Will you say?

A. No, sir.

Q. You won't say?

A. No, sir.

Q. You know Mr. Andy Hendricks, don't you?

A. I don't know whether I do or not.

Q. Do you know Mr. Earl Mattison?

A. No, sir; I don't know anybody by the name of Mattison at all; I may know the other fellow, one you speak about, but not by name.

Q. When these gentlemen were there drinking, did Lulu drink with them?

A. No, sir.

Q. They did the drinking themselves, did they?
A. I drank one glass of it, and Fannie drank one.
Q. Lulu didn't drink any?
A. No, sir.
Q. Did she ever drink any?
A. Yes, sir; she drank sometimes, but she didn' drink any that day or that night. She drank one glass of orange cider about 11 o'clock, and that is all she did drink; that is all she had had that day.
Q. I will ask you if since you have been here the last few days out here in the hall—you say you likely know Mr. Andy Hendricks—if you have not had some conversation with him out there?
A. I have been talking to——
(At this point Mr. Andy Hendricks and Mr. Earl Mattison are brought in and pointed out to the witness.)
Q. Do you know these two young men there?
A. Yes, sir.
Q. You know them?
A. Yes, sir; I don't know them by name; I know them by sight. I never met that big tallest one until here about a week ago.
42 Q. You have met Andy Hendricks before, have you?
A. Yes, sir; I traded with him in Mr. Schram's dry goods store.
Q. I will ask you if you did not tell Mr. Hendricks out here in the hall a few days ago that you didn't know much about the Tucker case, but you were going to swear enough to stretch his neck?
A. I didn't say it at all; Mr. Hendricks is just mistaken. I didn't say a word about stretching anybody's neck.
Q. Didn't you also say to that other young man, Mr. Earl Mattison, that you were going to swear enough against Tucker to break his neck?
A. No, sir; I didn't; for what I know I kept it to myself. I never told anyone else.
Q. You never told anyone?
A. Of course I was talking to Mr. Shellburn and saying some things to Fannie, but——
Q. What Shellburn?
A. Tom Shellburn.
Q. That was the deputy marshal who was running the saloon you went to that night?
A. He had been, but he was not then.
Q. I understand you to say you went to his saloon?
A. He had been running a saloon there; that is what I said; I didn't say he was running one at the present time, but he had run one before that; but as far as my telling either one of these young gentlemen anything of that kind I didn't do it at all. They have just made that themselves, or something, for I never told them; I am sure I never. I guess they wanted to have it said they were witnesses in the U. S. court.
Q. You think that is the reason they are here?
A. Yes, sir; I guess it is, for as far my telling them anything it is a mistake, for I never done it.
Q. You never told them anything?
A. No, sir.

43 Q. You had some talk out there, didn't you?

A. I have be'n talking with him ever since I have been here about first one thing and another; but as far as me ever telling either one of them that I would say enough to stretch Mr. Tucker's neck, or anybody else's neck, I didn't say it.

Q. I want to ask you if you didn't make this statement. You state now that this shooting took place between 8 and 9 o'clock?

A. Yes, sir; that is what I said.

Q. I will ask you if you did not state before the commissioner that it was after 9:00 o'clock that the killing took place?

A. No, sir.

Q. Did you say before the commissioner this: "On Saturday night about 15 minutes after 9 o'clock the defendants came to the door?" Wilson and Tucker were both on trial when you testified before the commissioner, wer' they not?

A. I don't know whether Wilson was on trial; they were up there.

Q. Yes; they were both being tried, Marshal Tucker and Willie Wilson.

A. I don't know anything about Wilson's trial at all; I don't know whether they were trying him; I didn't ask him. I know they had Willie in jail, but I didn't know whether they had tried him or not.

Q. Didn't you state there it was about 15 minutes after 9 o'clock the defendants came to the door?

A. I said between 8 and 9 o'clock.

Q. That is what you said before the commissioner?

A. Yes, sir.

Q. What was it they said when they came up there?

A. They said, "Open up."

Q. Did they call Lulu's name?

A. Yes, sir.

44 Q. What did they say?

A. They said "Lou" was the words he said. He didn't say "Lulu," but said "Lou."

Q. What did she say?

A. She says, "Who is it?"

Q. Did you say this before the commissioner: "Defendant Tucker came to the door and said 'Lou, open up.' She said, 'Is that you, Marshal?'" He said, "Yes.'"

A. Yes, sir.

Q. That is the way it was, is it? You stated before the commissioner that he came to the door and said, "Lou, open up," and she said, "Is that you, Marshal?"

A. Yes, sir.

Q. She didn't say, "Who is it"?

A. She said, "Is that you Marshal?"

Q. She didn't say, "Who is it," then? [Reading:] "She said: 'I have company and can't let you in.' He said, 'Open up,' and she said, 'I have company and I can't do it,' and he said, 'I will open up for you,' and then she called Fannie to the door, and asked her if she would open it, and Fannie said 'Yes,' and before Fannie got to her she was shot.'" When you went out what was the first that was said after you got out of doors?

A. Fannie said to Marshal Tucker, "For God's sake, don't shoot, Marshal; you have killed Lou."

Q. What did he say?

A. He didn't say anything. I don't remember anything.

Q. He didn't say anything, did he?

A. Until he walked in front of the door.

Q. He was in front of the door when you went out, was he?

A. No, sir.

Q. And he was not in front of the door when this lady said that to him, when Fannie said that to him, was he?

A. No, sir.

Q. Was he still behind the water barrel?

45 A. Yes, sir; I think he was.

Q. What was the first that he said after she told him not to shoot any more, that he had already shot Lou?

A. He walked up to Fannie and said, "Is that you, old girl—," he said, "Who is that? Is that you Fannie, old girl," and she says, "Yes," and he said, "Give me your hand," and he shook hands with her, and he said, "Now you can go."

Q. That is the first that he said after you went out, is it?

A. Yes, sir.

Q. He walked up to Fannie and said, "Is that you, Fannie, old girl?"

A. Yes, sir.

Q. "My old girl?"

A. No; he didn't say, "My old girl," or nothing of the kind. If he had said, "My old girl," I would have said so.

Q. I thought you said "My old girl?"

A. You didn't think any such a thing.

Q. I will let you have your way?

A. Well, I will have it my way.

Q. All right; we are not going to fuss about it now. That was the first that Marshal said after you went out, walked up to Fannie and said, "Is that you Fannie, old girl?"

A. Yes, sir.

Q. And shook hands with her?

A. Yes, sir.

Q. Then what?

A. He said "Now you can go."

Q. Then what?

A. We went, too.

Q. You went?

A. Yes, sir.

Q. That was the end of it?

A. Yes, sir.

Q. He said, "You can go," and that was the end of it; you went?

A. Yes, sir.

46 Q. That was all that was said, was it, out there?

A. That is all I heard said; I guess it was all that was said, for I was standing there.

Q. The first that was said when you went out there was the words of Marshal, that is, after Fannie said, "Don't shoot; you have killed Lulu," and he said, "Is that you, Fannie, old girl?" That was the next word, was it not?

A. Yes, sir.

Q. Then he shook hands with her, and said, "Now you can go," and you went?

A. Yes, sir; we went; you bet we did.

Q. You went in a hurry?

A. That is no lie; the grass did not grow under our feet going from that place, I guess. We did not stop.

Q. You went a running, didn't you, when you started?

A. I guess you might call it running; we were not walking.

Q. You were not flying?

A. No, sir.

Q. Or climbing?

A. No, sir; we laid our wings aside; we didn't have time to put them on.

Q. You went first to Mr. Shellburn's?

A. Yes, sir.

Q. Over to his saloon in old town?

A. Yes, sir.

Q. You have told all that took place in the conversation out there, haven't you; he didn't say to you then, "Don't come near me, or I will shoot you"?

A. Yes, sir, he did. I started to go to him, and he says, "Don't you come near me, or I will shoot you."

Q. You have told me now over two or three times all that was said——

A. I told you awhile ago he said that.

Q. You stated before the commissioner, "He had his pistol in his hand, and we run away and went to South McAlester."

A. No, sir; we went to Old McAlester, Old Town.

47 Q. (Reading:) "And got Mr. Shellburn." It is written South McAlester here.

A. We went to Old McAlester; if I said South McAlester, I was mistaken, for Mr. Shellburn didn't live in South McAlester at all.

Q. Do you still live at the same place?

A. No, sir.

Q. You say you expect to live here after the trial is over?

A. Yes, sir; I guess I will. I will live here if I do not go to Missouri again.

Q. How long have you been here?

A. I came here on Wednesday before I was to appear here on the 23rd.

Q. Of February?

A. Yes, sir.

Q. Up to that time you had been living at McAlester, had you?

A. No, sir; at Webb City, Missouri. After I went before the grand jury I went from here to Van Buren, Arkansas, and from there on to Webb City, Missouri.

Q. That is a mining town up there?

A. Yes, sir.

Q. Near Joplin?

A. Yes, sir; five miles from Joplin. I have got a couple of cousins in Joplin.

Q. Are they gentlemen or ladies?

A. I guess they are ladies; that is what they pass for; they told me they were; I don't know whether they are gentlemen or not; they said they were ladies.

Q. They said so, did they?

A. That is what they told me.

Q. What business were you engaged in up there?

A. I went up there to see my cousins, and I staid with them and my other folks part of the time.

Q. Have you got any acquaintances here?

A. No, sir; I have not.

48 Q. Did you have any at South McAlester?

A. No, sir; I had none there at all that was connected to me.

Q. You say that is called "Chippy Hill?"

A. Yes, sir.

Q. What makes them call it "Chippy Hill?"

A. Because there was some chippies up there, I guess.

The ASSISTANT DISTRICT ATTORNEY. That is little birds about that high [indicating with hand]? (Laughter.)

The COURT. Let me ask you right in that connection with reference to Old McAlester and South McAlester, how is that located; how far is that Chippy Hill from Old McAlester?

A. About a mile, I guess.

Q. About how far from South McAlester?

A. Between half a mile and three-quarters.

Q. Which side of the Missouri, Kansas & Texas Railroad is it on?

A. On the right-hand side as you go north.

Q. It is on the east side?

The ASSISTANT DISTRICT ATTORNEY. It is on the same side, she says, that Krebbs is on.

The WITNESS. I don't know which way it is, for I was turned around myself.

The COURT. Lulu's house, where she was killed, was on Chippy Hill?

A. Yes, sir.

Mr. CRAVENS (of counsel for defendant). You said you went there in August sometime, and this was on the 15th of September?

A. Yes, sir.

Q. You made a note of it, didn't you?

A. No, sir; I kept it in my head.

49 Q. You kept it there good, didn't you?

A. You bet I have.

Q. You know it was then?

A. Yes, sir.

Q. You can't be mistaken about that?

A. No, sir; I didn't say I was mistaken; I said I know t was then.

Q. You say you can't be mistaken when you put this on the 15th of September, on Saturday night?

A. It was Saturday night, the 15th of September.

Q. You will swear to that as well as you will to anything you have testified to, won't you?

A. I guess that is what I am up here for.

Redirect examination by Mr. MELLETTE, assistant district attorney:

Q. Let this square I have drawn here represent the house where Lou was killed; where would you put the door, about the center, or where?

A. No, sir; nearly to that end; about there [indicating on diagram].

Q. Where was the rain barrel?

A. About the corner—near the corner.

Q. Could you see the rain barrel from the door?

A. No, sir; you had to step off the steps before you could see it.

Q. Now, where was Marshal Tucker?

A. Standing right here.

Q. Behind the rain barrel?

A. Yes, sir.

Q. Where was Wilson?

A. Standing back this way from Tucker; standing in behind here. [Diagram is here made by witness locating different positions of different parties, and the same is exhibited to the jury by the assistant district attorney.]

Q. Where are you living, now?

50 A. Well, I have been living up in Webb City, Missouri. I gues' I will remain here if pap does not move.

Q. Who are you living with?

A. With my mama and papa.

Q. Your father and mother?

A. Yes, sir.

Q. I want you to answer this question: He asked you if you had any feeling against this man.

A. No, sir; I have not.

Q. You never had any feeling against him at all, one way or the other, except what has grown out of this case?

A. No, sir; not at all; I never had anything against Mr. Tucker; I thought right well of him.

Q. Are there many trees around that house?

A. Out this way from the house there is a good many trees; there is trees all along there on this side of the house. There is no trees on the hill at all.

Q. Is there any trees towards Old McAlester?

A. No, sir; not until you get down off the hill a little peice.

Recross-examination by Mr. CRAVENS:

Q. When you were standing in the door there, I want to know what direction you would be looking. If you would be looking out of the door would you be looking towards New Town or Old Town?

A. You would be looking across the railroad.

Q. Across the M. K. & T. Railroad?

A. Yes, sir; I guess it was the M. K. & T.

Q. It is the road that runs from one town to the other?

A. Yes, sir.

51 Q. You would be looking towards that?

A. Yes, sir.

Q. The house then fronted towards that railroad?
A. Yes, sir.
Q. The door would then necessarily be in the west side of the house?
The ASSISTANT DISTRICT ATTORNEY. Yes.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Suppose you left South McAlester and went up the railroad track to Old McAlester, which side would the house be on?
A. It would be on the side towards Krebbs.
Q. Is that the right-hand or left-hand side?
A. Right-hand side.
Q. Right-hand side as you are going north? It is on the right-hand side of the track, the side towards Krebbs?
A. Yes, sir.
Q. And it is between the two towns?
A. Yes, sir.
Q. Between Old McAlester and South McAlester?
A. Yes, sir.
Witness excused.

52 FANNIE ORWIG, having been duly sworn upon behalf of the Government, was examined by Mr. Mellette, the assistant district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Fannie Orwig.
Q. Where do you live?
A. I live at Colegate now.
Q. In the Indian Territory?
A. Yes, sir.
Q. Do you know the defendant, Marshal Tucker?
A. I am slightly acquainted with him.
Q. Did you know Lulu Mays in her lifetime?
A. Yes, sir.
Q. Where were you living at the time she was killed?
A. I was staying with Lulu.
Q. When was she killed?
A. In September, I think.
Q. Do you remember the date?
A. About the 14th or 15th; I could not say positive.
Q. What day of the week?
A. Saturday.
Q. What time of the night?
A. Between 8 and possibly a quarter of nine; between 8 and 9, or maybe a little after; I had no timepeice, to the best of my knowledge.
Q. I wish you would go ahead and tell the jury there all you know about the killing; about the defendant coming there, and all about it.
A. Well, Marshal Tucker came to the door Saturday evening, and he knocked at the door, and Lou said, "Who is that?" And he says, "Marshal." He says "Open up." And Lulu says, "Marshal, I have company." And he says, "Well, open up." She says, "No; I have got

company." And he says, "Open up, or I will open it for you."
53 She turned and asked me if she should open up, and I says, "Yes; open the door, of course;" and she says, "Come here;" and during the time he was pecking on the door with something; I do not know what; he was on the outside and I was on the inside; and he says, "Open it" again; and I started to go to her, and he shot, and it came through the door and shot her in the top of the head. In the meantime I was started to her, and she fell, brushed against my sleeve, my arm, and she says, "God have mercy on me!" I went and throwed the door open and run out, and I says, "Marshal, do not shoot any more, for God's sake! You have have killed Lulu, and don't kill us." And he says, "Who is this; is this you, Fannie, old girl?" And I says, "Yes; you remember me, don't you? You have saw me at Krebbs."

Q. Did he say that?

A. I told him that he had seen me; I told him that myself.

Q. You says to him, "You know me?"

A. Yes, sir; I says, "Don't shoot any more;" and he says then, "It is done," or "We done it," but I won't say positive, for I was too badly scared. And he said, "Give me your hand, old girl;" and I gave him my hand and shook hands with him, and stepped back, and he looked in the door, and he never came in the house at all; he never stepped upon the steps that I seen. Then Lillie rushed up; he seemed to be all right, then; he said, "Don't come to me; don't put your hands on me, none of you, or I will kill you."

Q. Did he have any weapons?

A. Yes, sir.

Q. What?

A. He had a pistol.

Q. When Lillie came out he said, "Don't put your hands on me, any of you."

A. Yes, sir; "None of you."

Q. And then what did you do?

A. He didn't do anything.

54 Q. What did you do?

A. He stepped back out in the yard, and just kind of wandered around there.

Q. I say, what did you and Lillie do after that?

A. He told us to go away. He kind of stepped back and said, "You can all leave here if you want to. Go on," he says, and we went away then.

Q. When you came out of the house where was he?

A. Standing then probably as far as from here to that desk, right out at the side of the house away from the water barrel.

Q. Could you see him as soon as you got out?

A. Yes, sir; when I first went out he was standing in front of the door on the ground.

The COURT. Who is it you have reference to; you have been calling him "Marshal" all the time?

The ASSISTANT DISTRICT ATTORNEY. Do you mean this man, the defendant?

A. Yes, sir; Marshal Tucker.

Q. This is the man?
A. Yes, sir.
Q. When you first got out he was standing in front of the door?
A. Yes, sir.
Q. Did you go out first or did Lillie?
A. I was the first one out. I opened the door myself. I started to see what she wanted with me. She says, "Come here," and I went there.
The COURT. Who said "Come here?"
A. Lulu.
The ASSISTANT DISTRICT ATTORNEY. You opened the door and rushed out, and he was standing in front of the door, and then you say he stepped around by the water barrel——
A. He just stepped out between the water barrel and the door after
55 he had spoken to me, and I and him shook hands with one another.
Q. Did you notice Willie Wilson there?
A. He was standing at the corner of the house where he was all the time. That was about 6 feet from the steps.
Q. Is that near the water barrel?
A. Yes, sir; right at the corner of the house the water barrel sets.
Q. How did he have the pistol when you went out, as near as you can remember?
A. He had his hand down that way [indicating by having hand down by side].
Q. Did he do anything else with the pistol—have the pistol in any other way?
A. No, sir; just talked to me naturally. When I went out and told him who I was he acted kind of funny, when I first went out there, but he was all right when I went to him, and shook hands with me.
Q. He said, you say, "I have done it," or "It is done?"
A. Yes, sir; he just kind of looked in the door, and he said one or the other. I was scared so bad I won't tell positively which one it was.
Q. You were frightened so?
A. I would not say positively which way he did say it, for I was scared so bad I can't remember.
Q. Had you seen Marshal Tucker before that night?
A. Yes, sir; I met him three or four times, about 3 times before that, I think.
Q. Now, during the time you say that he was standing there talking before the shot was fired, did you hear any talk outside?
A. I heard them as they came up, him and Billy, of course, but I didn't know who they were. They came up to the house, and I heard them
56 talking. They came right up and knocked at the door. I suppose Marshal was the man that knocked.
Q. After he knocked again did you hear anything said?
A. Yes, sir; he said, "Open the door or I will open it for you;" and Bill Wilson said, "Don't, Marshal; don't do that;" and Billy said, "Don't shoot;" or one of the two; I would swear it was Willie, almost—I think it was Willie said it; of course I did not see it from his own lips.
Q. When you left where did you leave the body of the dead woman?
A. Left it lying right on the floor where she fell; no one touched her.
Q. Did you throw the door open as you stepped out?

A. I throwed the door open as quick as she hollo*e*red "For God's sake——"

Q. Did she interfere with the door, the way she was lying, or did you open it wo*n*thout——

A. She kind of drawed her feet up, you know, and I could open the door then very easily.

Q. Then you went over to Old McAlester?

A. Yes, sir.

Q. When did you go back to the house?

A. I never went back at all until about day—the next morning—in a wagon with Mr. Ballard and his brother and another young fellow; I don't mind what his name is now.

Q. Did you notice wh*r*ther Wilson was armed or not?

A. No, sir; I didn't see him have any arms; he never offered to shoot any if he had any; I never saw anything of the kind.

Q. You got back there in the morning, you say, about daylight?

A. Yes, sir.

Q. Where was the dead body lying at that time?

A. She was dressed and laid out in her room.

57 Q. Was that the room where the killing occurred?

A. Yes, sir; the same room.

Q. Do you remember about where the bullet hole was in the door?

A. It was above the doorknob.

Q. Was it directly above the doorknob?

A. Kind of glancing.

Q. How do you mean by glancing; do you mean not straight, but diagonal?

A. Yes, sir.

Mr. CRAVENS (counsel for defendant). She can explain that; she can explain what she means.

The ASSISTANT DISTRICT ATTORNEY. Was it towards the center of the door over the doorknob, or——

A. I could not say; I didn't mind; I don't hardly think it was, though.

Q. Let's take a p*e*ice of paper and you draw how it was.

(Witness is given a p*e*ice of paper and pencil, and upon the paper represents that the knob was on one side of the door not quite one-half of the way up the door, and that the bullet hole was to the back side of the door about one-fourth of the distance of the width of the door, and above the knob about the same distance.)

Q. That is the way it was, is it?

A. That is the best of my knowledge; Mr. Willburton knows better than I do, though.

Q. How was that house built, on the ground or up from the ground?

A. Just setting up from the ground.

Q. How did you get up to the door; did you step from the ground up into the door?

A. No, sir; there was three steps.

Cross-examination by Mr. WILLIAM M. CRAVENS:

Q. Are you a married lady?

58 A. I have been; I am not now.

Q. Was your husband living at that time?

A. I don't know where my husband is; I have not heard from him for four or five months. I am separated from him. I don't know where he is just now.

Q. Where did you separate from him?

A. Up in Missouri.

Q. What place in Missouri?

A. We first separated in Nevada, Missouri.

Q. I believe you say you have been separated from your husband four or five months?

A. No, sir; I have been separated from him most two years.

Q. You have not heard from him for four or five months; is that it?

A. Yes, sir.

Q. Were you living at Lulu's house at the time she was killed?

A. Yes, sir; I had staid there about a week with Lulu.

Q. Where had you been staying prior to that time?

A. I had been staying at Krebbs' awhile.

Q. You went from Krebbs' to her house, did you?

A. Yes, sir.

Q. That is what is called Chippy Hill, is it not?

A. Yes, sir.

Q. She was keeping a house of prostitution, was she not?

A. Yes, sir.

Q. You had been staying there for a week?

A. Yes, sir.

Q. You were engaged in that business, were you not?

A. Yes, sir.

Q. Had you ever seen Marshal Tucker—I believe you said you did see him before?

A. Yes, sir; I saw him perhaps three or four times.

Q. At Krebbs'?

A. Yes, sir.

59 Q. You never had seen him at Lulu May's, had you?

A. No, sir.

Q. He hadn't been there while you were there?

A. No, sir; he wasn't in the habit of coming there.

Q. How long had you been at Lulu May's?

A. I could not say. I am not sure; it was a week or two. It was just a few days. I was going away and I went over there and staid a few days until I got ready to leave there.

Q. When had you last seen Marshal Tucker before that, as near as you can tell?

A. On pay day at Krebbs' Marshal came over there, and I didn't know who he was, and there was a part' told me who he was, and he came over there and staid two or three hours, I suppose, and he drank orange cider, and there was a beer joint just above there, Choctaw beer joint, and he asked me to walk down with him, and I did, and we were over there a couple of hours. That was the longest I was ever with him until the next day he came over again, and we got to talking, and he knew some people I did, and he came there the next day and staid awhile, but he was all right though, and treated me nicely.

Q. That is the only time you had ever seen him before the night of the killing, or had you seen him any other time?

A. I saw him that night and the next day, and then the time he done this.

Q. You had seen him over there, if I understand you, on pay day and the next day?

A. Yes, sir.

Q. And then you next saw him the night of the killing?

A. Yes, sir; but for knowing him I suppose I have seen him before, but I didn't know him.

60 Q. You heard them talking as they came up to the house that night before they got to the house?

A. Yes, sir; I heard them before they got to the house and after they got up to the door.

Q. But they just come up and were talking as people ordinarily do?

A. Yes, sir; just like anybody else would.

Q. Then he knocked at the door, or somebody knocked at the door?

A. Yes, sir.

Q. You didn't know it was him?

A. I didn't know which one it was.

Q. Somebody knocked at the door?

A. Yes, sir; I didn't know which one it was.

Q. You didn't know who it was?

A. No, sir.

Q. You don't know who fired the shot, do you?

A. No, sir; I never seen him fire it.

Q. You never saw anybody fire?

A. No, sir.

Q. You don't know whether it was him or Wilson fired, or who it was fired?

A. No, sir; I don't know who it was, whether it was him or Wilson; only he had the gun in his hand when I went out there. I could not say it was him, or whether it was either one of them, as far as that is concerned.

Q. How was Marshal Tucker dressed that night, if you recollect?

A. He had on a black hat. I don't know what kind of pants.

Q. What kind of a coat?

A. Dark-colored coat; you know he never went in the house and I could not saw.

Q. How was Wilson dressed?

A. He had on a light shirt and black pants, and a little soft black hat.

Q. White shirt?

A. Yes, sir.

61 Q. Didn't he have on any coat?

A. I won't say positive now, but I don't think he did. I don't think he had on any coat at all, because his shirt was so light.

Q. You were the first one out of the house after the shot was fired?

A. Yes, sir; I run out and talked to Mr. Tucker.

Q. How long after the shot was fired before you went out?

A. As soon as I could open the door.

Q. The door was locked?

A. Yes, sir.

Q. When Lulu fell, she fell against you; brushed your arm or sleeve?

A. Yes, sir; I could not say whether it was locked, or whether I unlocked the door, or whether it was locked. I was going to let him in, but she fell and her sleeve brushed against me, against my arm.

Q. Then you looked at him, did you?

A. I just looked at her and she said, "God have mer*ch* on me."

Q. You didn't know then whether she was shot or not?

A. Yes, sir; the blood was running out of her.

Q. Did you see that?

A. Yes, sir; I just turned my head. I seen the blood was running out and turned to go, and I said, "Lillie, you take care of the little boy; I am going out doors;" and I went out there.

Q. When you got out there, where was Tucker?

A. He was standing in front of the door.

Q. How far from the door?

A. Perhaps as far as from here to that desk [indicating about 10 feet]. I think it was about that far.

Q. Wilson was behind him, was he not?

A. No, sir.

Q. Where was Wilson?

62 A. Like this is the corner of the house, right at the water barrel.

Q. Wilson was standing out towards the water barrel; which way was he from the water barrel?

A. He was standing on the far side of the water barrel. He had his hand on the water barrel.

Q. Wasn't Tucker standing next to the water barrel, and Wilson behind him?

A. No, sir; Mr. Tucker was standing kind of not exactly in front of the door, and stepped up towards the barrel a little. He was a good ways away, though, from Tucker, Wilson was.

Q. How fa*t* was Tucker from the water barrel when you went out?

A. He was standing out more this way in front of the door, and Willie was out around the corner, the water barrel.

Q. Were you well acquainted with Willie?

A. No, sir; I am not acquainted with either party; neither one of them.

Q. You had seen Willie before, had not you?

A. I don't know; I might have seen him, but I wasn't acquainted with him. I wouldn't know him if I had seen him—yes, I will take that back; I saw him once in a hack some place; that is the only time I ever seen him to know him.

Q. That was Wilson?

A. Yes, sir.

Q. How can you tell which one it was that was talking outside?

A. Well, of course, I could not swear to either one of their voices.

Q. You could not swear to Wilson's voice or Tucker's voice, could you?

A. No, sir; but since I have got acquainted with the voices I could. I thought that was Mr. Tucker's voice, to the best of my knowledge, and I would say it was his. Of course I could not swear positively, for I never was well enough acquainted with either one of them.

63 Q. You never had heard Wilson speak before, had you?

A. I could not say that I had or not, because I was not personally acquainted with him.

Q. How long since you had seen Tucker at pay day at Krecbs?

A. It was most a month, because I went up to Muskogee and came back—I will say three weeks. I will not be positive——

Q. Three or four weeks?

A. Yes, sir.

Q. What was said outside; what was the first said when they came up?

A. I could not understand; I didn't pay any attention, because Lulu was talking to me, and I was cutting up with the little boy when they came *ip*. My little boy just came over to visit me that evening a little while, and I was playing with the child. I could not say what they said.

Q. Where was the little boy living?

A. Living at Mr. Bullard's. Mr. and Mrs. Bullard had just left there, perhaps 10 or 15 minutes before the boys came up, and I was to take him home that evening. They just left him there a little while. They keep him until yet.

Q. What time in the night was this that Tucker came up there?

A. Well, I could not say; between 8 and perhaps a quarter after 9. I had no timepiece, and of course I could not say positively.

Q. You just *gave* to guess at it?

A. Yes, sir.

Q. About how long, do you think, it had been dark? I am talking about now when Wilson and Tucker came.

A. I jusdge it must have been an hour and a half or two hours; perhaps more than that, because we had been to supper.

Q. Did you eat supper before or after dark?

A. We eat supper just at dark.

64 Q. Was there anybody there after supper besides Mr. Bullard?

A. Yes, sir.

Q. Who, besides Wilson and Tucker?

A. Benn Walls, and Bert Wiggington. They were there about an hour, I think.

Q. They staid there about an hour?

A. No, sir; they didn't stay there an hour; they were hunting a witness, and they came there and asked me if I knew where a certain party was.

Q. They had just gone out?

A. No, sir; they had been gone, I suppose, likely an hour and maybe longer, I could not say the time. It seemed long to me.

Q. You don't know how long they had been gone when Wilson and Tucker came.

A. They had been gone an hour, anyway, and maybe longer.

Q. Were they armed?

Q. Yes, sir; I believe so. I would not say, positively. I never saw the' with arms, but I saw their belts.

Q. Did they have cartridges in them?

A. I never noticed, I am sure.

Q. You didn't notice whether they had cartridges or not?

A. No; I never noticed even whether they had pistols on or not.

Q. You wasn't noticing, and you don't know what was said when Tucker and Wilson came up. The first thing you noticed was what?

A. I noticed when he was pounding on the door, and he was telling Lulu to open up or he would open it for her, and Wilson said, "Don't do that, Marshal; don't. Don't shoot," he says.

Q. Did he say "Don't do that," or, "Don't shoot?"

A. He just kept on talking to Lulu and told her to open the door. She wouldn't open it. She told him several times she had company, but she hadn't. She told a story then—she told him she did—well she did have company too—I and Lilie was company.

65 Q. When he came up, he said, "Open the door?"

A. He said "Open up."

Q. There was considerable conversation went on then between him and Lulu, was there?

A. He just came up and knocked on the door, and she said, "Who is that?" at first, and he said, "Marshal," and he said, "Open up," and she says, "Marshal I have company, I can't open up," and he says, "Open you, or I will open up for you," and I just thought he was joshing——

Q. Thought what?

A. Thought he was joking with us. He came around and talked at the door there maybe two or three minutes.

Q. You don't know whose voice it was said, "Don't do that?"

A. No; I could not say, because I didn't see it, but to the best of my knowledge it would be Willie's, since I have got acquainted with him since I have heard him that night, although I could not say positive, of course.

Q. Are you certain what was said, and that that was said?

A. Yes, sir. He said, "Don't do that. Don't shoot," is what he said.

Q. Which did he say?

A. He said, "Don't do that; don't shoot." That is what he said. And he was hitting the door with something, I don't know which one it was, but he was hitting with something on the door.

Q. Marshal made no effort to shoot you when you went out, did he?

A. No, sir; he never offered to shoot me. He had nothing to shoot me for. He just talked to me and shook hands with me.

Q. Talked kindly, did he not?

A. He said, "Who is this?" and I said, "It is Fannie," I says,

66 "Fannie," and he says, "Is it Fannie," and I says, "Yes," and he says, "Give me your hand, old girl," and I went on to explain to him, begged him not to shoot—I says, "Don't you remember me? You met me at Krebbs?" and he knew me, and shook hands with me. He talked very pleasant to me.

Q. He talked pleasantly to Lillie, when she came out; didn't he?

A. No, sir.

Q. What did he say?

A. He acted kind of funny. He said, "Don't come up to me." He says, "Go away from me; don't come up to me; don't put your hands on me, or I will shoot you."

Q. That was about the 14th or 15th of September, was it?

A. Yes, sir; to the best of my knowledge.

Q. After the shot was fired, did you say anything before you opened the door?

A. I just throwed the door open; I was hollering all the time, I suppose.

Q. Didn't you say, "Don't shoot any more; you have shot Lulu," before you opened the door?

A. No, sir; I had the door open, or opening it; I can't say which, positively. That is what I aimed to say, whether I said it or not.

Q. Here is your statement before the commissioner: "When she called me he struck the pistol against the door twice, and shook the door, and he told her to open it, and she wouldn't do it, and he shot through the door, and I called out, "For God's sake do not shoot any more, Marshal, and opened the door?"

A. I run to the door, saying it; I don't know whether I got the door open or not. I don't know whether I had the door open when I said it or not. Just as quick as he shot I commenced hollering, and I could not say whether I had it open or not; I would not say positively,
67 because any one would do that, whether the door was open or shut; they would holler.

Q. When you opened the door he was five or six feet from the door, was he not?

A. He was about as far as that table; I don't know how far you would call it.

Q. He didn't get any nearer the door than that, did he, after he went out. He walked up toward the water barrel, did he not?

A. I could not say; I think he kind of looked in. He never came up on the step.

Q. Did he come up any nearer the step than he was when you went out?

A. I don't remember; he looked in at the door; I do not know whether he walked up closer; I don't remember whether he did or not.

Q. When you said to him, "You have shot Lulu," didn't he say, "I haven't done any such damned thing," or, "I haven't done it," or that, "I didn't do it?"

A. No, sir; he says, "I done it," or, "It is done." I don't know which one he said.

Witness excused.

68 WILLIAM WILSON, having been duly sworn upon behalf of the Government, was examined by the assistant district attorney, Mr. William Mellette, and testified as follows, to wit:

Question. What is your name?

Answer. William Wilson.

Q. Where do you live?

A. South McAlester, Indian Territory.

Q. How long have you lived there?

A. About five months, I guess, or maybe longer; I don't remember just how long.

Q. Where did you live before that time?

A. Jenson.

Q. Jenson, Arkansas.

A. Yes, sir.

Q. How long did you live there?

A. Three years.

Q. Do you know the defendant, Marshal Tucker?

A. Yes, sir.

Q. How long have you known him?

A. I have known him when I seen him for three years, and personally acquainted with him it has been in the last year.

Q. Well, he is charged in this indictment with the murder of a woman by the name of Lulu May. I wish you would begin and tell all you know about it, all that occurred on the evening of the killing, when you first saw Tucker, and all about what was done.

A. He came into McAlester one evening on the 7:15 train; it gets there at 7:05——

Q. Did you know where he was from there?

A. I suppose he was from Jenson.

Q. He came in on the Choctaw road, I suppose.

A. Yes, sir; he got off there and went over to my father's house and got supper.

Q. What is his business—your father's?

69 A. He is running a hotel over there, and we went over there and we staid there. He got supper, went up in town, and staid up in town awhile, and went to a little billiard hall and staid there awhile, and went from there to a restaurant and we staid there a little bit, and him and another fellow was talking something about a pipe——

Q. Where was that talk?

A. That was at that restaurant where these darkies were running, and we stopped there, and I told him we had better go back and go to bed, and he said he didn't care anything about going to bed, and we went on back to the billiard hall, and they were just shutting the door, and we walked on back down the road apiece, and there was something said about going to Old Town. He had said something about this before, that he had some papers or something he wanted to serve; he didn't tell me who on, and there was something said to that amount, and he said, "Let's go to Old Town," and I told him I didn't care if I did walk over there, and so we started and we got about half a mile, I guess, fro' where this house was; there is a right-hand road, it runs off to the right and that main road went straight on.

Q. The talk had been about going to Old Town?

A. Yes, sir.

Q. That is old McAlester?

A. Yes, sir.

Q. How far are they apart?

A. A mile and a half, about, apart. We got over there, and there is a right-hand road, and the McAlester road went straight on. We took this right-hand road there and that throwed us up above where this house of this woman was, and we turned and went to this house where Lulu was, and he said, "I will go in and see who is in there."

Q. That is Lulu May's house?

A. Yes, sir; he walked to the door and she asked who was there, and he told her it was Marshal Tucker, and she told him she had company, and wouldn't let him in.

70 Q. What made her say that? Had he said anything up to that time?

A. He had asked her to let him, is all, and she said she had company and couldn't let him in. He knocked on the door again and told her to let him in, and she said, "I can't; you know I have got company." And he said, "If you don't let me in I will open it for you," just that way. I don't think there was anything else said until he put his hand back to his side and drew his revolver and punched the door once or twice, I suppose with the gun, for the prints of the gun are on the door, and he stepped back down off the steps and shot. He was up on the first step, then, I believe.

Q. That is, when he was punching the door he was on the first step.

A. Yes, sir; I think he was, or maybe the second one. I was off, I guess, as far as from here to the far side of the house, maybe.

Q. Then what occurred after the shot was fired?

A. They came running out and said, "Marshal," they said, "you have killed Lulu May," and I forget whether he made any reply or not, but the best I recollect he either went back to the door or started back, I could not say just exactly, which. No, I have got it wrong; some one came out of the house and met him, one of them did, shook hand' with him, to the best of my recollection; the other one either started up to him or started towards him, and he just caught his gun that way and told her to stop or he would kill her, and I walked up betwixt him and her and told him not to do that. They went on up to Old Town, or that way, them and this little boy. There was a little boy there, about 7 or 8 years old, I guess; they taken him and went on. We turned around then and went back to South Town.

71 Q. Now, what occurred then?

A. Going on the road he asked me if there was any train that was going down the Choctaw that night, and I told him no, and I said, "Why?" and he said, "If there was I would go home," and I told him, "There is no trains you can go on," and so we went right on over there into town. He had said before we got to town that he wouldn't give up to no man. He said he wouldn't give up at all. He said that once or twice, I believe, and then we went on over in town and got to a corner where there is a road turn went up in town and the other turns and went to my father's house, and he turned and went down there, and I turned and went up in town, and I got Mr. Hooper and Mr. Fowler and went back in there, and I never went and looked into the door until I came back.

Q. After he turned towards your house you turned up in town?

A. Yes, sir; I went to Mr. Pink Hooper's boarding house, where he is keeping boarders, and Mr. Fowler also went with us. There was three of us went.

Q. You went back to the house where the shooting occurred?

A. Yes, sir; we went back over there, and she was lying there in the floor dead. No one there but just the body. We hadn't been there long, just went in and looked at her; the' said we had better not touch it, that we had no right to touch it, and turned around and started back to town, and we met Mr. Lindley and Mr. Killpatrick and two or three more men.

Q. Who is Mr. Lindley?

A. He is a deputy marshal up there, chief deputy in charge of the McAlester court. We met him and Mr. Killpatrick and three or four men.

72 Q. Do you mean Dr. Killpatrick?

A. He is a policeman, is all I know.

Q. He is not a doctor?

A. No, sir. We went back over there and laid her out.

Q. After you met them you went back?

A. Yes, sir; we went back with them. I and Mr. Hooper and Mr. Fowler went back and laid her out, and there was two or three more men came while we were there, and we all turned back and came back to town.

Q. You laid her out, you say?

A. No, sir; I didn't, but the crowd did.

Q. Did you dress her or wash her in any way?

A. No, sir; just tied her feet together and folded her hands.

Q. Then what did you do?

A. I went back to town then; we all went back. Mr. Neal went down to our house to see if Marshal Tucker was there, and he was, and he brought him here.

Q. Where is that man Neal?

A. He is gone, I suppose; they say he is.

Q. When did he leave here?

A. Yes, sir; he left here yesterday evening, I heard.

Q. He was here as a witness in this case, was he?

A. Yes, sir.

Q. How long has he been here?

A. I believe he came here befor' I did. You had him subpœnæd, don't you remember? That Neal is the same fellow.

Q. I remember having him subpœnaed. Go ahead from there now.

A. Well, Will went back to the house——

Q. Will Neal, do you mean?

A. Yes, sir; went down to the house and him and Marshal came back up in town again.

Q. Tell about Marshal getting with him; I don't understand
73 that. When you got back to town; where did you get with Neal?

A. Neal met us on the road. We met Neal after we had been up there and started back. We met Neal; he had come across the hill from somewhere; I don't know where he had been. He said he come across from town. We met him on the road. He turned around and went back with us. Then Mr. Landley got him and two or three other men to go down and get Marshal, and he went down there and him and Marshal came back up in town together; he was down to our house. They came back up in town together, and he was turned over then to Mr. Willburton. He is the deputy marshal, also Mr. Shellburn. Mr. Shellburn wasn't there at the time, but he was there in not long afterwards; at least, I didn't see him at the time.

Q. You didn't go down to your house to see him at your house?

A. No, sir.

Q. Now, when this pistol was fired where were you standing?

A. The door is in the west side of the house, and I was standing north of him—right out towards Old Town, that is north—and he was standing at the door at the west side of the house.

Q. Is there a rain barrel there any place?

A. Yes, sir; I believe there was one standing right at the corner of the house.

Q. Where were you standing with relation to that rain barrel?

A. I was standing four or five steps, maybe further, from the rain barrel. When the shot fired I walked up pretty near to this barrel.

Q. Was there any conversation, anything said there, between you and Tucker, during the time he was at the door; did you say anything to him?

74 A. Yes, sir; when he punched the door I told him not to do that.

Q. Were you armed?

A. No, sir; I was in my shirt sleeves.

Q. You were unarmed?

A. Yes, sir.

Q. When did you go back to this house; did you go back any more?

A. No, sir; not after that night; after we had been over there and they had laid her out, I didn't go back any more. They buried her the next day, but I didn't go. That was on Sunday.

Q. You didn't go over there that morning at all?

A. No, sir.

Q. I will ask you whether the defendant was intoxicated or not?

A. Yes, sir.

Q. He was intoxicated?

A. Yes, sir; he was drinking.

Q. Did you have any conversation with him after the killing about the killing, and if so, state what it was, if any?

A. I do not know; there might have been some.

Q. He asked you about the trains?

A. Yes, sir; he asked me about the trains.

Q. Did you go to any other house before you went to this one where Lulu May lived; is there any other houses there?

A. Yes, sir; there is empty houses right out not very far from there; we were not right at them.

Q. Do you remember when he knocked what was said, who spoke after he knocked?

A. Yes, sir; the woman on the inside.

Q. What did she say?

A. She asked him, "Who is that?"

Q. Did he say anything?

A. He told her it was Marshal Tucker.

Q. He said it was Marshal Tucker?

Q. Yes, sir?

Q. He shook hands with one woman?

A. Yes, sir.

Q. What did he say to the other woman when she came out?

A. She came out and started towards him, and he told her to stop or he would kill her. I just walked in betwixt her and him, and
75 I don't know whether I said anything to her or not, or whether I done anything, but I walked in betwixt her and him, and told him not to do that.

Q. Had *been* Marshal Tucker been to South McAlester very much up to that time?

A. Yes, sir; he had been there right smart.

Q. What had been his business?

A. He had a case there in court.

Q. Had he been an officer or anything of that kind, as you know of?

A. He was once, but it has been a good while ago, I think.

Q. How far did you say you were from the door at the time this took place?

A. I was some 6 or 7 or 8 steps.

Q. When the shooting took place you say you walked up towards the water barrel?

A. Yes, sir; when the shot was fired.

Q. Were you arrested for this crime when Marshal Tucker was?

A. Yes, sir.

Q. And brought here?

A. Yes, sir.

Q. What became of the case; what was done with it?

A. Well, it went before the commissioner, and I was put under bond to appear before the grand jury.

Q. And the grand jury ignored the case against you?

A. Yes, sir.

Q. You testified before the commissioner in this case?

A. Yes, sir.

Q. And your testimony was written down?

A. Yes, sir.

Cross-examination by Mr. W. M. CRAVENS:

Q. How long have you lived at South McAlester?

76 A. It has been four or five or six months, I don't know just exactly.

Q. I mean how long had you lived there at the time the killing took place?

A. I hadn't been there more than a month, I guess, or a month and a half; somewheres along there.

Q. You had been at Chippy Hill before, hadn't you?

A. Yes, sir; I had been over there.

Q. How many times?

A. I had been over there once or twice. I passed by there several times.

Q. Now, this place called Chippy Hill—you know where it is, don't you?

A. Yes, sir.

Q. That is the place on a hill there where there is several houses of ill-fame?

A. There wasn't but one there at this time.

Q. There had been others there, wasn't there?

A. Yes, sir; there was two or three houses out there, but they were vacant; only one occupied at that time. I believe there was one other had a little stand in it, soda pop, and such as that.

Q. And you had been there once or twice—how often had you been there?

A. Two times.

Q. Hadn't you been there about three times, Wilson?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir; I had passed there.

Q. I am not talking about passing. I am talking about your being over there on business?

A. No, sir; I didn't have any business there.

Q. You were over there twice—or two times?

A. Yes, sir.

Q. Was it two times or twice?

A. Twice.

Q. You were there twice, were you?

A. Yes, sir.

Q. And you had passed there several times?

A. Yes, sir; I had passed there some three or four times.

77 Q. Where did you go when you passed there?

A. When I passed there most of the time I was hunting horses. We have horses out there.

Q. That is a horse range there?

A. Yes, sir.

Q. Everybody who loses horses about McAlester goes up to hunt them, don't they?

A. No, sir; not altogether.

Q. How many horses did you have?

A. We have got five or six head.

Q. They all run up on Chippy Hill, don't they?

A. No, sir; not altogether.

Q. That is where you hunted them. Did you hunt them anywhere else besides around Chippy Hill?

A. Yes, sir.

Q. Isn't there a road leading from South McAlester over to Krebbs?

A. Yes, sir.

Q. Don't that go by Chippy Hill?

A. It does if you want to go one way. If you go out of South McAlester in one way you have to go right up through there; if you go out another way you go down this end of town and go out this way.

Q. That is the east end of town?

A. Yes, sir.

Q. That would leave Chippy Hill off to the left?

A. Yes, sir.

Q. But the road from the town goes over Chippy Hill?

A. Yes, sir.

Q. To Krebbs goes there?

A. Yes, sir.

Q. How far is it from Chippy Hill to the road that runs between the two towns, right west—you say the house fronts west, the house where the woman was killed. It fronts the M. K. & T. Railroad, does it not?

A. Yes, sir.

Q. It is about a half a mile from the railroad, is it not?

78 A. No, sir; it is not half a mile, I don't think.

Q. How far is it from the railroad?

A. I don't know; something over a quarter.

Q. How far over a quarter?

A. It is between a quarter and half a quarter.

Q. The railroad is running north and south?

A. Yes, sir.

Q. North up to Old Town and south to South Town?

A. Yes, sir.

Q. Now, this Chippy Hill is a quarter and half a quarter off the railroad, and east of the railroad?

A. Yes, sir.

Q. Now, the road from Old Town——

The COURT. What is his answer to that?

Mr. CRAVENS (of counsel for defendant). It is a quarter and half a quarter from the railroad leading from Old Town to New Town.

The COURT. On the right hand as you go up to Old Town?

The WITNESS. Yes, sir.

The COURT. A quarter or a half a quarter from the railroad?

The WITNESS. A quarter and a half of another quarter.

The COURT. How far is it from Old Town to this place where Lulu May was killed?

The WITNESS. I declare I don't know; somewheres about three quarters of a mile, I guess.

Mr. CRAVENS (of counsel for defendant). How far from New Town?

A. About the same.

Q. About half way between?

A. Yes, sir.

Q. I will ask you if the road from Old Town to New Town, if the wagon road is not a big plain wagon road, and travelled a great deal between these two towns?

A. Yes, sir.

Q. I' was an old road before these two towns were there?

79 A. Yes, sir.

Q. It leads along beside the railroad?

A. Yes, sir.

Q. Then the wagon road is a quarter and a half a quarter away from this Chippy House?

A. Not the one I am talking about; they have got a new road.

Q. I am not talking about your horse running road, but the old road; does not the old road run along by the side of the railroad?

A. Yes, sir.

Q. Were you so ignorant of the country there, or of those roads, that you got lost in going over to Old Town, and went over on Chippy Hill?

A. No, sir.

Q. You said you started to go over to Old Town, and you said the first thing you knew you found yourself over on Chippy Hill; that Marshal proposed you go to Old Town, and you were agreed.

A. We were up at the Mountain House; that is where we were at when he said that.

Q. To get from the Mountain House to Old Town don't you go down to the railroad, or near the railroad, and go up the road that way?

A. No, sir.

Q. Can you go from the Mountain House to Old Town without going down to that livery stable which stands in 40 feet of the railroad?

A. Yes, sir; you can go another way.

Q. You would have to go through the brush?

A. No, sir.

Q. Do you tell me there is a wagon road from the Mountain House over to Old Town without going down this way?

A. You can turn and go down and go up a road going right around the park and get in a new road that goes to Old Town.

Q. I will ask you if the stage that runs from the depot—that is east of the Mountain House, is it not, or southeast, the depot?

80 A. Yes, sir; it is southeast.

Q. That is southeast of the Mountain House?

A. Yes, sir.

Q. I will ask you if the hack that runs from Old Town to New Town does not run down by that stable in going to the depot?

A. Yes, sir.

Q. And the stable is in 40 or 50 feet of the railroad, is it not?

A. It is on the wagon road.

Q. It is right on the wagon road right in 50 feet of the railroad, is it not?

A. Yes, sir; somewheres about that.

Q. Not exceeding 100 feet from the railroad?

A. Yes, sir.

Q. The plain wagon road runs up to Old Town by the side of the railroad?

A. Yes, sir.

Q. How did you get lost and get up on Chippy Hill if you had started with Marshal Tucker over to Old Town; that wasn't a very dark night, was it?

A. We were not in that road.

Q. The reason you were not on that road is because you were not going to Old Town?

A. We got in this other road, it runs right into the old road, and it is a near-cut road, and it is the nearest road from where we were at.

Q. Where were you when you started?

A. Do you know where the court-house is?

Q. Yes, sir.

A. We were not far from that, right there at the corner. Right where the street runs down to the corner, going down to the court-house. We turned and went across the road up by the Mountain House; there is a path that turns and goes out by the schoolhouse.

Q. That is up over a rocky precipice—over rocks?

A. Yes, sir; we went and got into this path here——

81 Q. There is no bridle path through there; you could not get a wagon through there?

A. No, sir; we went across there and this road runs across.

Q. You state you and Marshal started walking; he said "let's go over to Old Town;" he said he wanted to serve some subpœnaes?

A. He said some papers; I don't know whether they were subpœnaes or not.

Q. You said you didn't care if you did walk over there?

A. Yes, sir.

Q. You went climbing up over that rocky hill and got up on Chippy Hill?

A. We went across and got into this road. There had been a new road cut there; pretty near all the travel there.

Q. Does that road run by Lulu's house?

A. About 100 yards from her house.

Q. That is a plain road after you get over the hill?

A. Yes, sir.

Q. I will ask you if that very road does not go out by this stable, and then turn out to the right over the brow of that hill there?

A. There is one turns here.

Q. The wagon road?

A. They are both wagon roads; one crosses the other right there. This new one goes straight across to Old Town, and the other one goes across here and goes on to Krebbs.

Q. I will ask you if the road going to Krebbs does not go around by th's stable and down by this railroad?

A. Yes, sir; you can, but you can go in this other way and work across; there is a heap of travel on it, or you can go back to the east part of town and go right back east and never go out towards Old Town at all.

82 Q. Isn't this west road there the one that goes out by this stable which stands on the railroad there; isn't that the main traveled road to Krebbs for wagons and buggies?

A. Well, I don't know whether it is or not. There is a great deal of travel on it. It is the most of it back this way from Old Town; none of it goes that way to Krebbs.

Q. I will ask you if all the buggy and wagon travel going to Old Town does not go by that stable principally?

A. Yes, sir.

Q. Is there any other direct road going to Old Town?

A. Yes, sir; there is a road goes right through, right below the courthouse, about 100 yards; you go a road up from the Choctaw depot——

Q. Wasn't that fenced, that park you are talking about? Didn't that run across there last September? Don't you know that park was opened since last September, since the last fall term of court?

A. I don't know; it may have been——

Q. I will ask you if during the September term of court, if that road or lane, or street, or whatever you call it there had been opened through the park?

A. I declare I could not tell you; I don't know whether this was cut out there then or not. I do know there was a road there. I don't know how long it has been cut. It has been cut I guess some eight or ten months, and maybe not so long.

Q. Marshal was pretty drunk that night, was he not?

A. Yes, sir; he was drinking some.

Q. Some?

A. He was drinking right smart.

Q. How many times did he fall down going over there?

A. If he fell down any time I didn't see him.

83 Q. Didn't he fall down two or three times going from New Town over to where this woman was killed; slip and fall or stumble and fall, not fall flat down, or wallow over, turn over. But didn't he fall down to the ground?

A. I don't remember; I don't think he did.

Q. I will ask you if he didn't fall one time and drop his pistol, or his pistol jerk loose, and you tell him to give you the pistol?

A. No, sir.

Q. You deny that?

A. I deny it, because I know he didn't do it.

Q. I will ask you, if as you went from New Town over to Chippy Hill, if you didn't get in possession of his pistol at one time when he stumbled over?

A. No, sir.

Q. You deny that, do you?

A. Yes, sir; I never had the pistol in my hands at all.

Q. You never had it in your hand in your life?

A. I don't know; I don't believe I ever seen the pistol before.

Q. When you got over there you were surprised to find yourselves at Chippy Hill, were you?

A. No, sir; not very.

Q. You were not going there on purpose?

A. No, sir; I did not go there intentionally, not exactly a purpose; when we got there we were there.

Q. You say this house where Lulu was killed is over 100 yards off from this new road, the road you speak of?

A. Yes, sir.

Q. How did you get up to that? What did you go up and get off of this new road which you say is a big wagon-traveled road when you were going to Old McAlester?

A. It is not a big old traveled wagon road; it hadn't been trav-

84 eled much; it was traveled some.

Q. It was a starlight night, was it not?

A. I won't be positive; I believe there was stars shining.

Q. It was not a very dark night, not a cloudy night?

A. No, sir; it was not very light, though.

Q. It was as light as an ordinary starlight night, was it not?

A. Yes, sir.

Q. You were walking?

A. Yes, sir.

Q. Are you blind? Couldn't you see the road?

A. I am not altogether blind.

Q. Couldn't you see the road?

A. Yes, sir.

Q. How did you get off the road up to Lulu's house, where the woman was killed?

A. I never noticed; that is the reason. I did not pay much attention; I just happened to——

Q. Don't you know you invited Marshal to come and go with you to Chippy Hill when you were down at Joneses in the town from where you started from; that you invited him to go up with you?

A. No, sir.

Q. Didn't you tell him to come and let's go?

A. I told him to come on, and let's go; I was going to take him home, and we were going to bed. We went back to the billiard hall then, and they were just shutting up.

Q. You were meaning then to go home and go to bed, were you?

A. Yes, sir; I was aiming to.

Q. I will read some of your examination before the commissioner: "I went back to the place and said to him, 'Marshal, come on and let's go.' He got down from off the counter," that is where he was sitting at
85 Joneses, "and we went back over to the billiard hall." Isn't that right?

A. Yes, sir.

Q. Didn't you call him off the counter and say, "Let's go?"

A. Yes, sir.

Q. And then you went down to the billiard hall?

A. Yes, sir.

Q. And the man had closed up when you got down there, or was closing up when you got there?

A. Yes, sir; he was closing.

Q. Then where did you go after he closed up?

A. That is where we started from there; we started from there and went on down——

Q. Where did you start to go to from there?

A. Started down home is where we started to go, and got down there to this corner, and he said, "Let's go to Old Town."

Q. Got down where; to what corner?

A. Right there at the corner of the road that runs up to the Mountain Hotel.

Q. (Reading.) "After he had closed up we walked down, possibly, about 100 yards, and Marshal said something about going to Old Town, and I told him I didn't care if I walked over there or not. We went on about half a mile from South Town on the road going from Old Town, and there was a right-hand road, and we took the right-hand road, and we lost the road, and we went about a quarter , and there was a house right up ahead of is, and I said, 'We are wrong; that the house wasn't on the McAlester road.'" You were lost, were you not?

A. A little bit; yes, sir. I was not a noticing. If I had been a noticing——

Q. Lost on Chippy Hill?

A. This here house we were right at was an empty house.

Q. When you found you were lost what did you do?

A. We turned and started across back to go back to the road, and we walked on the east side of the house and there was a window there—

86 I believe there is a window in the east side; I won't be positive, but anyhow you could see a light there, and Marshal said, "Let's go in and see who is there," and we went around to the door, and there is a window in the front of the house.

Q. He said, "Let's go in and see who is in there?"

A. Yes, sir; and he went up to the door and knocked at the door.

Q. You knew whose place that was, didn't you?

A. Yes, sir.

Q. You knew that was Lulu's?

A. Yes, sir.

Q. You had been there before?

A. Yes, sir.

Q. What was done then?

A. He knocked on the door and she told him she had company.

Q. Was that the first thing she said, that she had company?

A. No, sir; she asked us who was there; that was the first.

Q. What did he say?

A. He told her that it was Marshal Tucker.

Q. Did he say it was Marshal Tucker and Mr. Wilson?

A. No, sir; he just said it was Marshal Tucker. She says, "Who is there?" and he says "Marshal Tucker."

Q. How near was he to the door?

A. When he knocked he must have been on the steps. He knocked on the door.

Q. You were behind him then, were you not?

A. No, sir; I was off to his right.

Q. Which way was he fronting?

A. He was fronting the west then, I suppose; his back was to the west, and his face was to the door, and the door was in the west side of the house.

Q. He was fronting the east, then?

A. He was facing to the east with his back to the west.

Q. Which way were you from him?

A. I was off northward.

Q. You were north of him?

A. Yes, sir.

87 Q. His back was to the north—no, I mean to say his back was to the west and his face to the east, and you were off to his right and north of him?

A. Yes, sir; north of him.

Q. And to his right?

A. No, sir; to his left.

Q. You said awhile ago you were to his right?

A. I got mistaken.

Q. You got mixed You said awhile ago you were to his right. I said "You were behind him, were you not," and you said, "No, I was off to his right." Was that right or wrong?

A. I made a mistake if I did.

Q. You said you were off to his right, didn't you, awhile ago?
A. Yes, sir.
Q. Were you off to his right or not?
A. Not the way he was standing.
Q. I asked you if you were not in behind him and you said, "No, I was off to his right?"
A. Yes, sir.
Q. Were you or not?
A. No, sir; I wasn't.
Q. You were to his left, were you?
A. Yes, sir; I just made a mistake; that is all. I aimed to speak it right.
Q. You were north of him?
A. Yes, sir.
Q. McAlester was north, was it not?
A. Yes, sir.
Q. You were going nearly towards McAlester, were you not; going north towards Old Town?
A. Yes, sir.
Q. How is it that you were walking in front of him so that you were in 8 or 10 steps in front of him?
A. The way it was, when we came up to the house he turned and went around to the corner of the house and went to the door, and I went here and stopped.
Q. You must have walked on past him?
A. Not far; it may have been a little bit past him.
88 Q. You were bound to walk past him if you were with him, and he stopped at the door, and you went——
A. I walked four or five steps past him.
Q. You didn't stop, didn't you?
A. No, sir.
Q. When he turned there at the door, were you not going in, to'?
A. No, sir.
Q. You were not going in?
A. No, sir.
Q. You were too pure and virtuous to go into such places?
A. No, sir.
Q. Why didn't you go in there?
A. I had no business in there.
Q. Did you intend to let him go in and leave you out in the cold?
A. No, sir; he didn't aim to stay there, anyhow, I supposed.
Q. How do you know that?
A. I didn't know it, but I supposed he did.
Q. How did you know he didn't?
A. I didn't know.
Q. You knew it was Lulu's house?
A. Yes, sir.
Q. And you supposed Marshal would just be satisfied in looking in and going on, and you would be satisfied to stand out there in the cold and look in; that is the sort of a young man you are, is it?

A. I don't often go around——

Q. It is very seldom you go around. I want to know, now; I want some reason—he went to the door to get admittance?

A. Yes, sir; I suppose so.

Q. Didn't you intend to go in?

A. If he went in there he would have went in, and I would have staid out there.

Q. Didn't you intend to go in?

A. No, sir.

Q. Why not?

A. Because I didn't want to.

89 Q. What was the matter with you?

A. I didn't start over there with the intention of going in.

Q. You just got lost there between these two towns a mile apart, and a big road going from one to the other; a road alongside of the railroad, and you got lost?

A. I wasn't very badly lost.

Q. Were you not hunting horses that night?

A. No, sir; I was not hunting my horses.

Q. Were you not hunting a filley?

A. No, sir; not particular.

Q. You just actually got lost, and you swear that here to this jury, do you, between Old Town and New Town?

A. I won't say I was lost.

Q. You got up to Lulu's house?

A. No, we didn't get there; when we found we were off the road——

Q. You knew where you were when you were off of the road, and at Lulu's house?

A. Yes, sir.

Q. Why didn't you go on?

A. I told you we started, and Marshal, when we got there, he said "I want to see who is in there," and we had to go right straight direct north—not exactly north, either, but west——

Q. You would have to go west, wouldn't you?

A. Not exactly west; a little west, and when we got there he said, "I will go in there and see who is in there."

Q. The house is not on any road, is it?

A. Yes, sir.

Q. No wagon road there, is there?

A. Yes, sir; there is a wagon road right in the yard, you might say; there is no fence around the house.

90 Q. You were going to stay out and let Marshal go in?

A. If he had went in I would have staid out.

Q. What were you trailing around with him for, going over to Chippy Hill and to McAlester, that night, for?

A. He said something or another about going, and——

Q. Did you have any business over at Old Town?

A. No, sir.

Q. Did he tell you that he had anything to do over there, any business over there, any papers to serve—what was it he said about that?

A. He said he had some subpœnaes, or something, to serve—had some papers, or something.

Q. Is it a usual thing for deputy marshals to walk around here in the night, from town to town, hunting witnesses and serving papers on them?

A. Not often.

Q. And then land up at Chippy Hill?

A. Yes, sir; they land up there once in a while.

Q. When this shot was fired how far were you from Marshal Tucker?

A. Well, I don't know, hardly; as far as from here to that wall, I reckon, maybe a little further than that from the door. The door is in the center of the house, I guess. I was as far as from here to that wall over there.

(Witness is here shown a diagram of the house where Lulu May was shot, and the surroundings.)

Q. The door in this house is in the 'est, is it not?

A. Yes, sir. I was standing right out there [indicating on diagram]. I was right there when the shot was fired. There is a water barrel sitting right here, and I walked up pretty near even to the water barrel when the shot was fired.

Q. You could se' what Tucker was doing when the shot was fired?

A. Yes, sir; I saw him.

91 Q. You would have to look around the corner? Your eyes are not crooked?

A. No, sir; it was straight for me.

Q. You were just on a line with the corner, were you?

A. Yes, sir; something near it.

Q. How far from the corner of the house were you standing? As far as to that wall, I believe you said?

A. It may have been that far; it wasn't a great distance. The water barrel was setting right against the house.

Q. When the ladies came out, who came out?

A. There was a couple of girls came out.

Q. When they came out where were you?

A. I was somewhere near the barrel.

Q. Where was Tucker?

A. When they came out he had started from the door.

Q. Do you know Lillie?

A. Yes, sir.

Q. Where was he when she came out?

A. Somewheres out here, then, to the best I remember.

Q. Where were you?

A. I was standing right here, not far from him when these girls came out.

Q. I thought you said he was here when the shot fired, and that you walked up here to the water barrel?

A. I started up here and got pretty near to the water barrel, and he came around here and met me right here, and we both remained out here.

Q. Then the girls came out. Where was he when the girls came out?

A. I don't remember; somewheres along there.

Q Where were you?

A. I was somewheres here.

Q. He was somewheres here, about where that "T" is on the diagram, with you in front of him, up towards the house? Locate
92 yourself on this diagram. He was about her', was he?

A. Yes, sir.

Q. Where were you at that time?

A. I was somewheres right close to him.

Q. Which way from him?

A. I don't know; I guess along about here [indicating on diagram].

Q. This mark will represent on the diagram where you were when Lillie came out, and this mark where Tucker was.

A. Yes, sir; but I won't be positive.

Q. Tucker was behind you from the corner, and coming here past this corner they would meet you and then meet Tucker as they went out; is that right?

A. I declare, I was excited at the time.

Q. Now, don't get excited at the old horse range, there at home.

A. I was somewheres there.

Q. You were there, were you?

A. Yes, sir.

Q. On Chippy Hill?

A. Yes, sir.

Q. Didn't you say a minute ago you were about here [indicatin' on diagram]?

A. Yes, sir.

Q. And you thought Tucker was about here [indicating on diagram] when Lillie came out?

A. I believe I was standing right along here, somewheres, or maybe a little further; I won't be positive. We were not far apart.

Q. You were nearer to the corner than he was when Lillie came out?

A. Yes, sir; I believe I was. I believe I was nearest to the corner.

Q. So he had left the door when she came out——

A. When she opened the door I believe he was standing right at the door, maybe he had started away from the door, but he was somewheres here.

93 Q. Where were you, then?

A. I was right along here near the water barrel when they came out; I walked back a step or two, then. (Diagram as explained by witness is here shown jury.)

Q. You say when these women came out you were there, a little ways from the water barrel?

A. Yes, sir.

Q. Marshal behind you?

A. No, sir; not when they came out; he was betwixt me and the door when they came out.

Q. When Lillie and Fannie came out, did they come out together?

A. No, sir; I believe Lillie came out behind Fannie, a little ways.

Q. Wasn't Fannie out there and have some conversation with Marshal before Lillie came out?

A. Yes, sir; she had spoken to him. We were all standing not very far apart, the three of us. When Fannie came out Lillie came out just a little afterwards, within a little short time, right behind her, I guess, and I believe that one of them, I forget which one, had the child.

Q. Marshal was arrested that night by Neal, was he not?
A. No, sir; Neal didn't arrest him, I believe.
Q. Didn't you say that Lindley sent Neal down to the house?
A. Yes, sir; to see if he was there and bring him up.
Q. He brought him up?
A. Yes, sir.
The ASSISTANT DISTRICT ATTORNEY. Do you mean your house?
The WITNESS. Yes, sir.
Mr. CRAVENS (of counsel for defendant). You don't know where he was?
The ASSISTANT DISTRICT ATTORNEY. He says he sent him down to the house.
Mr. CRAVENS (of counsel for defendant). You don't know what house he sent to?
A. Will told me.
94 Q. Who told you?
A. Will told me after he got back.
Q. I am not talking about what Will told you. After this shooting was over, you went away; you went back to town at once?
A. Yes, sir.
Q. And Tucker went with you?
A. Yes, sir.
Q. And Tucker left you to go to your house to go to bed, did he not?
A. No, sir.
Q. Didn't he leave you to go to your house?
A. Yes, sir; he left me to go to my house, and I went back in town?
Q. He left you to go to your house?
A. Yes, sir.
Q. With the purpose of going to bed, as he said?
A. Yes, sir; I suppose so; I don't know.
Q. Where did you go then?
A. I went up to Mr. Hooper's; to Pink Hooper's.
Q. What does he do?
A. Runs a restaurant, a boarding house. I went up there and got Mr. Fowler and him.
Q. Where is Fowler?
A. I don't know where he is.
Q. What was he doing there?
A. He was a kind of a music teacher.
Q. You got Fowler and Pink Hooper and went back to where the women were?
A. Yes, sir.
Q. As you returned you met Lindley and the others people going out, Killpatrick among them?
A. Yes, sir.
Q. You went back with them?
A. Yes, sir.
Q. And the woman was laid out?
A. Yes, sir.
Q. When you went back to town, it was then that William Neal went and brought Marshal Tucker up?
A. Yes, sir.

Q. Where did he bring him to?

95 A. He brought him up to Jack Ellis's, I believe.

Q. At the Mountain House?

A. No, sir; he lived out on the corner from the Mountain House.

Q. When were you arrested for the killing of that woman?

A. They got me the next morning.

Q. You were arrested the next morning?

A. Yes, sir.

Q. You and Tucker were brought down here together under a charge of killing the woman?

A. Yes, sir; I suppose so; they never——

Q. Were you not brought down here and put in jail together?

A. Yes, sir.

Q. You only suppose that. Don't you know whether you were brought down here; is that only a supposition?

A. No, sir; I was brought here.

Q. What was done with you when you were brought here?

A. Put in jail.

Q. In a few days you were brought out for trial before the commissioner?

A. Yes, sir.

Q. And then you got out of it by giving your testimony against Marshal Tucker, didn't you?

A. No, sir.

Q. Didn't you give your testimony before the commissioner against him?

A. Yes, sir.

Q. And you were put under bond and appeared as a witness before the grand jury, were you not?

A. Yes, sir; I suppose as a witness; I was put under bond, I know.

Q. Is that the first time you have been arrested?

A. No, sir.

Q. You were arrested for killing a man out here at Jenson last fall, were you not, with Tom Harper?

A. Yes, sir.

96 Q. You and Tom Harper arrested together?

A. Yes, sir.

Q. You were brought in here a prisoner with him?

A. Yes, sir.

Q. That was a shot, as it was claimed, through the door?

A. Yes, sir.

Q. A chippy house, too, was it not? There was some chippies in the house with you; you were in the house with chippies?

A. No, sir; I wasn't in the room the chippies were in at all.

Q. You would not be caught in the same room, but you were in the same house?

A. Yes, sir; in the same house, in a side room.

Q. You came up here, and you got out of that by giving your testimony against Tom Harper, didn't you?

A. Yes, sir.

Q. You did give your testimony, didn't you?

A. Yes, sir; they turned me loose before giving testimony. The commissioner turned me loose.

Q. You are a witness against him now, are you not?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. He has great influence, for he gets everybody to turn him loose.

Mr. CRAVENS (of counsel for defendant). That is the second chippy scrape you have been in?

A. I have been accused of it.

Q. Both last fall?

A. Yes, sir.

Q. And in both you turned a witness against the man you were arrested with?

A. Yes, sir.

Q. Did you state before the commissioner, Mr. Wilson, that Marshal Tucker asked you, as you went down that night towards town, if there was any train going on the Choctaw road; did you say anything about that before the commissioner?

97 A. I don't remember whether I did or not.

Q. Don't you remember you didn't say anything about that before the commissioner?

A. I might have not; I won't be positive.

Q. Did you ever tell that before as you have told it here on this witness stand as a witness?

A. I don't remember.

Q. You don't remember of telling it before, do you?

A. I believe I told it before the grand jury; I won't be positive.

Q. You have got the edge of me there; I wasn't there, and nobody else that can tell what you said. You don't remember of telling it before the commissioner, do you?

A. No, sir; I don't.

Q. When did you first think of that?

A. I could have thought of it then if he wanted me to think of it, but I was bothered and didn't happen to think of it.

Q. That is the reason you didn't tell it before the commissioner; you didn't happen to think of it?

A. Yes, sir.

Q. Does your memory get better with age or worse?

A. Oh, I don't know.

Q. The further a thing is off the more you recollect about it, is that the way of it?

A. I don't know as it is.

Q. How is it you recollect more about it and tell more about it now? You were examined before the commissioner here within a week after this woman was killed?

A. Yes, sir.

Q. Or within two weeks?

A. Yes, sir; in about 2 weeks.

Q. Now, how is it you recollect now things you didn't recollect then?

A. Why, I don't know.

Q. You can not explain that, can you?

A. No, sir.

Q. Will you swear here now you told that before the grand jury;
98 that he inquired if there was a train going on the Choctaw so he could go home that night?

A. No; I could not swear it.

Q. You could not swear you told that before the grand jury?

A. No, sir.

Q. You could not swear you ever told that as a witness before you told it here to-day, could you?

A. I don't know whether I could or not; I could not say positive.

Q. You didn't know the woman was dead when you left the house that night; you didn't see her, did you?

A. No, sir.

Q. I mean when you and Tucker went off from there together?

A. No, sir; I hadn't seen her at all. I only knew what the women said; they said she was killed.

Q. That is all you know about it?

A. Yes, sir; they came out of the house, and I never went to look in.

Q. The only information you had was from the women?

A. Marshal went to the door, or started to the door, and he said she was lying there on the floor; I never went in.

Q. I will ask you if this is not the way: If Marshal didn't say this, when they said, "You have killed her," or "You shot her," and "Don't shoot any more; you have shot Lulu," didn't he say, "I haven't done any such damned thing?"

A. I don't remember whether he did or not.

Q. Did he not say, "I didn't do it?"

A. He may have said it.

Q. Don't you know he said it; didn't you hear him say it, "I didn't do it?"

A. Yes, sir; I believe I heard him say it.

Q. When the woman told him there he said he hadn't done it. Don't you know you heard him say that, and that you have heretofore said when Marshal was charged with that there he denied it.

A. Yes, sir; I believe he said he didn't kill her when the women
99 came out of the house.

Q. When you were brought down here at that time, how long did you stay there before you were brought here at McAlester?

A. Well, it was Monday.

Q. This killing was on Saturday night?

A. Yes, sir.

Q. And you were arrested Sunday morning?

A. No, sir; I was not arrested; they just came to me and told me they wanted me to come down to Fort Smith with them on Sunday morning; told me to be at the train the following Monday morning, and I went to the train and went on down.

Q. They slipped you in the jail when they got you here?

A. Yes, sir.

Q. You say you were not right behind him when he was standing at the door?

A. No, sir.

Q. You had not stopped there because you did not intend to go into that chippy house?

A. No, sir; I would have had to have went plumb around him to get behind him.

Q. Did he knock on the door?

A. Yes, sir; I think I heard him knock.

Q. What with?

A. Knocked on it with his fist, I suppose.

Q. You didn't see what he knocked on it with?

A. Well, I didn't pay any attention. I just saw him walk up to the door and knock on it. I didn't suspect anything, and I didn't notice him very close.

Q. Did you see any pistol in his hand before the shot fired, before you heard the report of the gun?

A. I saw something in his hand; looked to me like a pistol.

Q. Which hand was it in? Which hand did he have it in?

100 A. He had it in his right hand.

Q. How was he ho'ding it? That is, when he punched the door?

A. I could see something in his hand that looked like it was a pistol.

Q. You say you saw something in his hand that looked like a pistol?

A. Yes, sir; it looked like a pistol or something. I was a right smart peice off, and I could not tell exactly what it was.

Q. How far off were you?

A. I have already mentioned that.

Q. As far as from you to that wall? Now, if you could not see that big road from South McAlester to old McAlester, how is it you could see that pistol? It wasn't a white pistol, was it?

A. No, sir; it was a dark pistol, dark handle.

Q. If you could not see well enough to travel that road, how could you see well enough to see that pistol?

A. There was a light in the window——

Q. Was he near the window?

A. No, sir; the window is right opposite the door, though. It gave kind of a little light out, would make it lighter than it was out in the road where we were at.

Q. Did you say it was a pistol?

A. I taken it to be a pistol; yes, sir.

Q. His side was towards you, according to the way you locate yourself, and his left side was towards you?

A. Yes, sir.

Q. And this thing, whatever he had in his hand, was in his right hand?

A. Yes, sir.

Q. Now, you said "He put his hand back to his side; he had his side to me, and I could not see; then he hit the door with something like two or three times. He punched the door; it may hav' been a pistol."

A. Yes, sir; I took it to be.

101 Q. When you were testifying before the commissioner you said then it might have been a pistol, and now you say you took it to be a pistol; then you said you could not say, and now you say you took it to be a pistol?

A. I took it to be a pistol; it looked like a pistol to me.

Q. In the dark, and you standing as far as you say you were from him?
A. There was a light there.
Q. You then said it might have been a pistol, and you told me awhile ago when the women came out he was around at the place you marked "T" on that plat; didn't you say that?
The ASSISTANT DISTRICT ATTORNEY. He didn't say that, *O* do not think; he said when Fannie came out he was in front of the door.
Mr. CRAVENS (of counsel for defendant). When Lillie came out he was around there; I believe you are right about that. (To the witness.) When Marshal came up to where you were you say you were off as far as from you to that side of the house there, when the shot was fired; when he came up to where you were did he have his pistol in his hand; did you see the pistol; you said he came up to you after he was shot?
A. No, sir; I don't believe he had it in his hand.
Q. He did not, you do not think?
A. I could not say positive that he did, but he taken it out——
Q. You didn't see his pistol when he walked up?
A. No, sir; he had his hand back on his side; back like he had it on his pistol, and I suppose he did.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

102 Q. Mr. Cravens has asked you if you were arrested about the Harper shooting that occurred out here at Jenson, and you stated to him you were in the house there where the shooting took place?
A. Yes, sir.
Q. How many were in the house at Jenson?
A. There was 6 or 7, or five or six.
Q. What kind of a house was it you were in?
A. There was a business there, a business store; it was a lunch counter, and a little grocery store together.
Q. And you were all in there when the shooting took place?
A. Yes, sir.
Q. The shooting was done from the outside?
A. Yes, sir.
Mr. CRAVENS (of counsel for defendant). We can show it was not.
The ASSISTANT DISTRICT ATTORNEY. We had better stop that investigation right now, I reckon, on account of the case being for trial, and so I will not ask anything else about that. (To the witness.) You were discharged before the commissioner before you gave any evidence?
A. Yes, sir; I didn't give any evidence before the commissioner at all; they never taken it before the commissioner.
Q. You were not even examined before the commissioner?
A. No, sir.
(Witness is here exhibited diagram.)
Q. You say the house was a quarter and a half a quarter from the railroad?
A. Yes, sir.
Q. How did the roads run; what road did you take in order to go by these houses, and this house particularly? (Witness indicates on
103 diagram the location of the different roads between Old Town and South Town, and between South Town and Krebbs, and the roads in the vicinity of where the killing occurred.)

Q. You started on this road, and intended to go right across to Old Town?

A. Yes, sir; we went right up by the Mountain Hotel. We just happened to take this road, and came right up here pretty near to this house, and I says "Maybe we are wrong," and we turned then and went right back across here, and got into the road. There is a path runs right across here.

Q. How far was this road from Lulu May's house?

A. It was, I guess, 75 yards.

Q. Had you ever been here on this road to South McAlester?

A. No, sir; I had come this road here, but I had never come this road down here. I have crossed it several times, but I have never travelled it.

Q. Do you remember, or did you notice, where the shot was in the door?

A. It was one of these small-panel doors, and it was in the top panel. I don't know whether it was half way up, or whether it was in one of the top panels. This panel was gone; I never seen the hole but once, and that was that night.

Q. The panel is gone out of the door?

A. Yes, sir.

Q. You don't know who took it?

A. No, sir; I don't have an idea who took it.

Q. How long has it been gone?

A. I think it was taken out there in two or three weeks, or in a short time after it was done. Maybe it wasn't as long as 2 weeks. I won't be sure when it was done, how long it was.

Q. How did it happen you didn't go in and see the woman, before you left there with Marshal Tucker?

104 A. I don't know hardly why I didn't, but I didn't; I don't know why. I was excited, and I didn't think about it I reckon.

Q. You got away from there?

A. Yes, sir.

Q. You say you were unarmed?

A. Yes, sir; I went in my shirt sleeves.

Q. Did you see anyone there about that house at all except you and Marshal Tucker? Any men?

A. No, sir.

Q. Here is something that Col. Cravens did not read to you, in your examination before the commissioner: You speak here before the commissioner about him drawing his pistol there at the door. Is that correct? Did you see him draw his pistol?

A. I saw him put his hand back here, like he went to draw his pistol, and I saw something that looked like a pistol.

Q. After that you say you supposed it was a pistol that he had in his hand?

A. Yes, sir.

Q. Had you seen him with a pistol before that night?

A. Yes, sir; I saw him with it at home.

Q. Had he been in the habit of stopping at your house?

A. Yes, sir.

Q. What became of his pistol after he left the killin' and went on?

A. He carried it right on with him.

Recross-examination by Mr. CRAVENS:

Q. You say you never had travelled that new road to McAlester before?

A. Well, I don't think I had ever travelled it. I had crossed it. I had travelled it part way, but I never did travel it all the way.

105 Q. You told me, awhile ago, that you had never travelled the new road from New Town to South Town before?

A. Yes, sir; I said it.

Q. That was true?

A. Yes, sir; to the best of my recollection; I never did travel it, to the best I know.

Q. You were at the Mountain House, and I will ask you if the ordinary way of going to Old Town is not to go down by that stable, which would put you in that old road?

A. Yes, sir; that is the custom——

Q. I will ask you if there is not a wide open street from the Mountain House down to that stable, right west?

A. Yes, sir.

Q. And from that stable a wide, open road running to Old McAlester?

A. Yes, sir.

Q. Plain open highway?

A. Yes, sir.

Q. I will ask you if, from the Mountain House, the way you had to climb over there, you did not have to climb over high rocks and great bowlders from this house, where you can not go wit' a horse?

A. There is a road going that way, over that way, but no horseback roadway, or very good way, anyway.

Q. Was there a horseback way through there at all?

A. You could go through there, but I do not suppose they ever did go through there.

Q. You never did see anybody riding through there in your life?

A. No, sir.

Q. That is the road you took that night to get into this new road you had never travelled before?

A. Yes, sir.

Q. How far is it from the Mountain House down to this stable, where you would be in the main road leading up from New Town to

106 Old Town; it is not over 100 yards, is it?

A. Yes, sir; it is, I guess, about 100 yards, or something over.

Q. Wide open street down to it?

A. Yes, sir.

Q. Wide open road from there up to Old Town by the side of the railroad?

A. Yes, sir.

Q. That would take you right directly west from the Mountain House to the stable, would it not?

A. Yes, sir.

Q. Now, I will ask you if the Mountain House at one end of it and the stable at the other is not the end of that street; does the street run any further east than the Mountain House?

A. No, sir; the street does not.

Q. Does the street run any further west than the stable?

A. No, sir.

Q. Then when you left the Mountain House you didn't go in the street, but climbed up this footpath way, over these rocks?

A. Yes, sir.

Q. Instead of going down to the open road to the stable, which is the travelled way, is it not, that the hacks and stages go that run between the two towns?

A. Yes, sir.

Q. When you left there you say you were excited and did not go to see the woman; that is the reason you didn't go to see her; you left there?

A. I don't know why, really, I didn't go to see her.

Q. You told the assistant district attorney you were excited?

A. I was right smart excited.

Q. You didn't leave before Marshal Tucker did, did you?

A. No, sir.

Q. You left with him, didn't you?

A. Yes, sir.

107 Q. Now, you state the shot was in the top panel of the door?

A. Yes, sir.

Q. How far, I will ask you, it was from the line of the doorknob; I will ask you if it was not right nearly over the doorknob?

A. I declare I believe it is somewheres near it; it is in that little panel; it is in one of these little pine doors. It was somewheres in the panel.

Q. It has two panels above the knob?

A. No, sir; but one panel; it is just a little light pine door. There was just four panels in the door.

Q. Two above and two below?

A. Yes, sir.

Q. In this door into the judge's room there is two panels above and two below; it is just like the upper part of that door is, was it not?

A. Yes, sir.

Q. Only not so large?

A. Yes, sir.

Q. I will ask you if it was not in the panel next to the knob?

A. Yes, sir.

Q. Not directly above the knob, but in the panel which is closest to the knob?

A. Yes, sir.

Q. Then it was in the side of the door next to the knob*b*, nearly over the knob?

A. Yes, sir; the best I recollect it it was in that panel, or right pretty near over the knob. I never seen the shot only just that night.

Q. Which way did that door open; when you stood there in the west looking at the door, which side of the door was the knob?

A. On the right, I believe.

Q. When you are standing with your back to the west it would

108 be on the right. You would open it with your right hand; it would be on your right?

A. No, it would be on the left, open to the left; the knob would be to the right.

Q. Suppose this is the opening here; this is the door, and this is west here, and the door would swing here, and the knob would be here, and the hinges would be here, and it would open back this way?

A. Yes, sir.

Q. And the shot was over the knob, or nearly over the knob, in the peanel nearest the knob?

A. Yes, sir.

Q. How high was that shot there, how far from the top of the door?

A. I could not hardly say; of course this door here is a great deal taller than the one there.

Q. You were not there the next day?

A. No, sir.

Q. You never saw the panel afterwards?

A. No, sir.

Q. How far was the bullet hole from the knob of the door?

A. I declare I don't know exactly; I guess a foot, or maybe a little more than that.

Q. How far from the lefel of the floor, from the ground?

A. It is about 2 or 3 feet, I guess.

Q. There are three steps leading up to door from the ground?

A. Yes, sir.

Here court adjourned until Friday morning, March 10, 1893.

FRIDAY MORNING, *March 10th*, 1893—9:00 o'clock.

Redirect examination of WILLIAM WILSON by the assistant district attorney:

Q. How long had you lived at South McAlester?

109 A. I had not lived there more than 6 or 8 weeks, I think; it had been about that long.

Q. You were not very well acquainted there, then, at that time?

A. No, sir.

Q. How much had Marshal Tucker been to your place there since you had left there?

A. Marshal Tucker had been there off and on for a month, I guess.

Recross-examination by Mr. WM. M. CRAVENS:

Q. Been there off and on for a month?

A. Yes, sir; he attended court for a while there.

Q. How long had you been there?

A. About 6 weeks.

Q. Marshal was not there all the time, was he; was not making that his home?

A. No, sir; he was not there all the time.

Q. Just in and out?

A. Yes, sir; he was there at one time about a couple of weeks, I guess, or maybe longer, a little.

Q. When was it you went up to this chippy house and this woman was killed?

A. It was in September.

Q. What time in September?
A. Either the 14th or the 15th, the best I recollect.
Q. You know Mr. Steve Farrel, don't you?
A. No, sir; I do not believe I do.
Q. Was he not in jail with you at the time you were in there, a crippled man, one short leg?
A. I saw him around 'ere; I know his face, but I didn't know his name.
Q. Didn't you see him in jail when you were in there?
A. Yes, sir.
110 Q. I will ask you if you didn't tell him while there, and also Charles Hankins—you know Charley Hankins, don't you?
A. Yes, sir.
Q. If you didn't tell them you had no idea of the shooting; that you had no idea who did the shooting, and that you were standing there behind and near to Marshal Tucker when the shot was fired by someone from behind or fired from behind?
A. No, sir; I did not tell that.
Q. Didn't you tell that to Mr. Hankins?
A. No, sir.
Q. And didn't you tell it to Mr. Ferrel in the jail over here?
A. No, sir; not that I recollect of at all.
Q. Didn't you tell them you could not swear to anything that would hurt Marshal, and al' you would swear to was that the shot came from behind?
A. No, sir; I didn't tell them that I would swear that the shot came from behind.
(Witness excused.)

111 Miss BELLE WILSON, having been duly sworn upon behalf of the Government, was examined by Mr. William M. Mellette, assistant district attorney, and testified as follows, to wit:

Q. Your name is Belle Wilson, is it?
A. Yes, sir.
Q. Where do you live?
A. I live at South McAlester.
Q. Are you a sister of William Wilson?
A. Yes, sir.
Q. Do you know the defendant, Marshal Tucker?
A. Yes, sir.
Q. Do you remember the night or the evening on which the woman by the name of Lulu Mays was said to have been killed?
A. Yes, sir.
Q. I wish you would tell all you know about the affair, about Marshal Tucker that evening, or that night, where you saw him, and all about it to the jury; when you first saw him and when you saw him again.
A. He came on the train and taken supper at my father's house, and went up in town, and the next time I saw him was about 9 or half past 9, I don't remember which. He came back after he did the killing, and I saw him when he came back.

Q. You say he first took supper at your father's house?

A. Yes, sir.

Q. Went off and then came back about 9 or half past 9 probably?

A. Yes, sir.

Q. Now, what conversation did you have with him, if any, when he came?

A. I didn't have very much conversation with him. He told me he was in trouble. I didn't know what was the matter. He said there had been somebody killed down in town and they accused him of it.

Q. Did he say anything else, now?

112 A. He talked on awhile, not very much; just talked, that his ne'k would break, and that he had killed the woman, and to never give him away.

Q. Did he have any arms?

A. Yes, sir.

Q. What did he have?

A. He had a pistol.

Q. What was done with it?

A. I taken it away from him after he came back to the house. He took it out in his hand, and I told him to give it to me, and he did so. I kept it until Mr. Neal came in, and I turned it over to him.

Q. How did you happen to take it away from him?

A. He put his hand back in his back pocket and took the pistol out, and of course I didn't know what he was going to do, and it—he had it there, and I took it away from him.

Q. How did you take it away?

A. Just taken it out of his hand.

Q. And then, when Mr. Neal came, you turned the pistol over to Mr. Neal?

A. Yes, sir.

Q. You think that was about 9 o'clock or half past, do you?

A. Yes, sir; about 9 or half past 9; our timepiece had stopped, and I don't know just what time it was.

Q. After you had got the pistol away from him, what did he say before Mr. Neal came?

A. He didn't say anything very much, only just talked about his mother. He was so sorry for her. He didn't talk very much about anything; he told me that he had done the killing.

Q. Now, did he say anything about where he was going, or anything of that kind?

Mr. CRAVENS (of counsel for defendant). Let her tell what was said.

113 The WITNESS. He asked if there was a train going out that night, so he could get away, and we told him none, except on the M., K. & T., and he said he didn't want to go that way.

The ASSISTANT DISTRICT ATTORNEY. Now, do you know whether your brother was armed that night, William Wilson?

A. No, sir; if he was armed I didn't know it. He never carried a pistol at all.

Q. Did he own a pistol?

A. No, sir; there was never a pistol about our house. We didn't allow them about the house at all.

Q. He didn't own any?

A. No, sir; he didn't own any pistol at all.

Cross-examination by Mr. W. M. CRAVENS:

Q. How old are you?

A. I am 22.

Q. You were living with your father at that time?

A. Yes, sir.

Q. At South McAlester?

A. Yes, sir.

Q. You formerly lived up here at Jenson?

A. Yes, sir.

Q. You are a sister to William Wilson?

A. Yes, sir.

Q. What condition was Mr. Tucker in as to being drunk that night or sober?

A. He was drinking some when he came in to supper.

Q. What time did he come to supper?

A. It was between 7 and 8 o'clock; I don't remember just what time.

Q. What time did the Choctaw train arrive there then? He came on the Choctaw train, did he not?

A. Yes, sir; I don't remember; the train was hardly ever on time; sometimes it was and sometimes it wasn't.

Q. The train time was after supper, wasn't it?

A. Yes, sir.

114 Q. How long did he remain at the house after supper?

A. About half an hour, I suppose.

Q. Who went off with him?

A. Well, I could not say who went off with him, because he was out in the yard; he staid out there awhile, and I could not say who went off with him.

Q. Did you see your brother when he went off?

A. No, sir.

Q. Before the killing?

A. No, sir.

Didn't your brother go off with him?

A. Of course I do not know; I could not say; he was out in the yard at night and it was dark.

Q. Who was in the house with him while he was in the house?

A. There wasn't anybody with him, only our own folks and him.

Q. Wasn't your brother in there with him?

A. I don't remember whether he was in there at the time or not when he went out.

Q. Didn't he come with him from the train; didn't your brother bring him up from the train to your house, or come with him?

A. I could not say; he was in the house the first I ever knew of it.

Q. You don't know who came with him?

A. No, sir.

Q. When you first saw him in the house wasn't your brother in the house, too?

A. I could not tell you whether he was or not, because we were very busy in the kitchen getting supper, and the first I seen he was in the house.

Q. Do you know when your brother went out of the house?

A. No, sir; I don't.

Q. Do you know when Tucker went out?

A. Yes, sir.

Q. You saw him when he went out?

A. Yes, sir; I saw him go out of the door.

Q. Did anybody go out of the door at the same time; didn't
115 your brother go out of the door at the same time with him?

A. No, sir; Tucker went out by himself. They didn't go out together as I remember.

Q. Are you positive about that?

A. Yes, sir.

Q. You are sure they didn't go out together?

A. Yes, sir.

Q. Did you see anything more of him until you saw him about 9 or half past 9 o'clock that night?

A. No, sir.

Q. He was still intoxicated when he came back, wasn't he?

A. Yes, sir.

Q. He went to bed at your house, did he not?

A. No, sir.

Q. After he came back he remained there. Do you know Mr. Will Neal?

A. Yes, sir.

Q. He remained there until Mr. Will Neal came after him, did he not?

A. Yes, sir.

Q. What time did he come after him?

A. I believe about half past 10 or 11 o'clock.

Q. He had been there an hour or two before Neal came after him.

A. Yes, sir; about an hour and a half or two hours.

Q. When he came back he said he was in trouble.

A. Yes, sir.

Q. He said a woman had been killed in town, and he was accused of it?

A. Yes, sir.

Q. What was your exact language in reference to that?

A. He said there had been somebody killed down in town; I think that he said there had been a lady killed, and they accused him of it. He said there had been a killing down in town, and they said there had been a lady killed and they accused him of it.

Q. What was it he said first?

A. The first statement he made was he said he was in trouble.
116 He said there had been somebody killed——

Q. And he was accused of it?

A. Yes, sir.

Q. Didn't he tell you then he didn't do it?

A. Yes, sir; he said once he didn't do it, and he told me after that——

Q. That was right at that time or when he said he was accused of it?

A. Yes, sir; along about that time.

Q. Along in the same conversation he said he was accused of it, but hadn't done it. You say that afterwards—was he having this conversation with you or somebody else in your presence?

A. He was having it with me, and then my sister was in after a while. She didn't talk to him as much as I did.

Q. She didn't hear all the conversation?

A. No, sir.

Q. Did she talk to him?

A. Yes, sir.

Q. There was nobody in the room but yourself and sister at any of these conversations, and your sister was there only a part of the time?

A. Yes, sir.

Q. He said there had been somebody killed down in town, and he was accused of it, but he hadn't done it?

A. Yes, sir.

Q. What else was talked about there; anything else?

A. No, sir; there wasn't anything else talked about, only that?

Q. Now, you say that after awhile at sometime he said he had killed the woman, but for you not to give him away.

A. Yes, sir.

Q. He was drunk at that time, was he not?

A. Yes, sir; he was drunk.

Q. Was that when he had his pistol out? You said he took his pistol out and you took it away from him. Was it when he had the pistol out he made that statement?

A. No; I don't remember if that was when he had the pistol or not. Of course we were kind of excited, too, and I could not remember
117 every thing that was happening there just exactly right.

Q. You can't exactly remember ev'rything right?

A. No, sir; not just how everything was.

Q. You didn't make any note of what he said; you didn't write it down?

A. No, sir.

Q. Were you examined before the commissioner?

A. No, sir; this is my first time.

Q. This is the first time you have been a witness and testified in the case?

A. Yes, sir.

Q. Your brother William was arrested at the same time Tucker was, or the next day, was he not?

A. Yes, sir.

Q. Brought down here and put in jail?

A. Yes, sir.

Q. Did you come down then?

A. No, sir.

Q. This is the first time you have been here, is it?

A. Yes, sir.

Q. What was he doing with the pistol when he took it out?

A. Nothing.

Q. What was he going to do with it?

A. Nothing that I could see. He took it out in his hand and I told him to give it to me, and he did so.

Q. At your request he gave it to you?
A. Yes, sir.
Q. What did you do with it?
A. I put it away until Neal came, and I gave it to him.
Q. What kind of a pistol was it?
A. I don't know much about pistols; it was a large one.
Q. I mean as to the color of it; it was not a white pistol, was it?
A. I can't say what kind it was.
Q. It wasn't ivory handle, or silver or nickle plated?
A. I can't say what kind of a pistol it was; I don't know what
118 color it was. It was very large; I do know that.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You say he was drinking; to what extent was he intoxicated? Do you know whether he was drunk? You know what a drunk man is, and what a man is that is just intoxicated some?
A. When he first came in that night he wasn't so drunk. He was drinking a little. He wasn't what you would call a drunk man. He could talk sensible enough.
Q. How was he when he came back?
A. He was drinking some worse when he came back. He may have been excited some, too.
Q. You could not tell?
A. No, sir; he seemed like he was drinking a little more when he came back than he was the first time.
Q. When he came there he was drunk——
A. He wasn't what you would call a drunk man.
Q. When he came back, then, you think that he was drinking a little more, but you say he might have been excited?
A. Yes, sir; he was drinking some more, I believe.
Q. Did you see him have any whiskey?
A. No, sir; not a drop.
Q. When he came back there he was talking to you; what manner did he talk; did he talk intelligent or how?
A. Yes, sir; he talked very nice. It seemed like he was in trouble, and talked a great deal about his mother, and that is about all he talked about.

Recross-examination by Mr. WM. M. CRAVENS:

Did he stay at your house that night?
119 A. No, sir; he staid there until Neal came after him.
Q. Had he not gone to bed before Neal came, or do you know that? Do you know how that was?
A. No, sir; he was in the front room all the time.
Q. You were up when he came?
A. Yes, sir.
Q. You were all up?
A. No, sir; nobody but me.
Q. Just yourself and him?
A. Yes, sir.
Q. Did you smell whiskey on him?
A. No; I don't know that I did.
Q. You don't remember that?

A. No, sir; I don't know as I did; of course, I could tell that he was drinking.

Q. I know you say he was drinking. When he came back he was more under the influence of liquor than when he went off after supper?

A. Yes, sir; somewhat.

Q. I will ask you if they did not speak about your brother and he having *h*one to the sal*l*on and got something to drink after supper?

A. No, sir.

Q. Didn't you hear about that?

A. No, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. If there was anything said there at any time by him——

Mr. CRAVENS (of counsel for defense). I object to that. I object to your leading the witness.

The ASSISTANT DISTRICT ATTORNEY. Is there anything else you can remember that he said there?

A. No, sir; there is nothing els'. He didn't do any talking
120 hardly at all. He said he had killed her, and he was talking about leaving that night if he could get a train going towards home.

The ASSISTANT DISTRICT ATTORNEY. I th*u*nk, if your honor please, I have a right to refresh her recollection.

Mr. CRAVENS (of counsel for defense). I don't think he has. This is a very friendly witness——

The ASSISTANT DISTRICT ATTORNEY. I think I have a right to ask, if there was any statements made about a certain thing, to state what they were.

Mr. CRAVENS (of counsel for defense). Do not think you have. You have a right to ask her what was said and all that was said.

Th' COURT. You can do that first, and if she does not recollect, and the attorney has knowledge there are other facts, he can bring her mind up to those facts.

Mr. CRAVENS (of counsel for defense). We object to that, your honor, and of course save our exception.

The COURT. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. How long did Neal stay when he came there?

A. He didn't stay but just a short time.

Q. Where did he go when he left?

A. He said he was going up to the court-house, u' in town. I could not say where he went to.

Q. Do you know what he went up there for?

A. No, sir.

Q. Did he go up there before Marshal went with him?

A. Yes, si'.

Q. Do you know what he went up there for that time?

A. He went up to see what had been done.

Q. What made him go up to see what had been done?

121 Mr. CRAVENS (of counsel for defense). I object to your leading the witness. What took place between her and Neal is not competent.

The ASSISTANT DISTRICT ATTORNEY. Yes; I think it is.

The WITNESS. Tucker went in this room when he first came, and he told Neal that he was in trouble. Tucker went into Neal's room and told him that.

Mr. CRAVENS (of counsel for defense). You didn't hear that?

The ASSISTANT DISTRICT ATTORNEY. Did you hear that?

A. No, sir.

Mr. CRAVENS (of counsel for defense). Then, of course, she can not tell that.

The WITNESS. Told him; and he went down to see what was done.

The ASSISTANT DISTRICT ATTORNEY. You didn't hear the talk between them?

A. No, sir; I didn't hear anything until after Tucker came out in the room where I was at.

Q. What did Tucker say when he came out of the room when he had been in there with Neal?

A. He didn't say anything; he went out.

Mr. FANNIN (assistant district attorney). Did he say where Neal was going?

A. No, sir.

Q. What did he say there after Neal came back?

A. Neal taken him off in his room.

Q. When Neal first came into the room?

A. I don't remember what he said then.

Q. Did the defendant tell you at any time what Neal went up in town for?

A. No, sir; I don't suppose he knew himself; he was drinking.

122 When Neal came in he took him right on his room, and of course I don't know what he talked about in there and what he took him in there for.

Q. Did he say anything about the officers?

A. He said if they come after him he would never give up.

Mr. MELLETTE (assistant district attorney). I have her statement written here, and that is what I want.

Mr. CRAVENS (of counsel for defense). That's what you were fishing for?

Mr. MILLETTE (assistant district attorney). Yes, sir; I knew she had told me that.

Mr. FANNIN (assistant district attorney). Did he make that statement while Neal was up town or after he came back?

A. It was while Neal was up town, the best I can remember.

Recross-examination by Mr. WM. M. CRAVENS:

Q. Neal was a deputy marshal?

A. Yes, sir.

Q. Did he make any objection to going with Neal when Neal did come after him?

A. No, sir.

Q. You didn't hear of any; he went off quietly at Neal's request?

A. Yes, sir.

Redirect examination:

Mr. FANNIN (assistant district attorney). They didn't go off as soon as Neal came in, did they? Where did they go when Neal came
123 back; did they go immediately out of the room and off up town?

A. He taken marshal out in his room and staid a few minutes and then went to town.

(Witness excused.)

124 WILLIAM WILSON, having been duly recalled by the Government, was examined further by the assistant district attorney, Mr. William M. Mellette, and testified as follows, to wit:

Question. After you got with Marshal Tucker, after he came in that night, I will ask you if Tucker had any whiskey?

Answer. I didn't see any; no, sir.

Q. Do you know of his drinking any whiskey?

A. Well, no, I didn't see him drink any, but I could smell it on his breath.

Q. I mean after you went with him that night, after he came in on the train?

A. No, sir; drank nothing but cider, and drank a couple of drinks of cider.

Q. Apple cider?

A. I don't know what kind it was. It was apple cider, I suppose. That is all he drank that I know.

Q. That is all he drank as far as you know?

A. Yes, sir.

Q. You saw no whiskey about him at all?

A. No, sir.

Q. What was this man Hooper's name you spoke of going to, and getting to go back up to the place where this woman was killed?

A. His name is Pink.

Q. Is he here?

A. Yes, sir.

Q. Is he a witness for the Government?

A. No, sir; a witness for the defense.

Q. I mean the Hooper you wakened up and took back to the place of the killing. His name is Pink Hooper, is it, and he is a witness here for the defense?

A. Yes, sir.

The COURT. Where did you wake him up?

A. At his house; he was running a restaurant there, and he was at home.

125 Q. That was after the killing, and you went over to his place?

A. Yes, sir.

Q. How far does he live from the house where the killing took place?

A. About three-quarters, I suppose, maybe further; something near three-quarters, I suppose.

Q. I have not got in my mind the location or distance from this house from Old Town to New Town and the railroad.

The ASSISTANT DISTRICT ATTORNEY. Do you want a diagram?

The COURT. No, I don't care for one.

Mr. CRAVENS (of counsel for defense). The witnesses have stated, two of them, that it was about three-quarters of a mile, or a little more, from the old town, and a little over half a mile from the new town.

The COURT. That is what I recollect, but——

Mr. CRAVENS (of counsel for defense). This witness says a quarter and a half a quarter from the M., K. & T. Railroad.

The COURT. On the right of the railroad, going north?

Mr. CRAVENS (of counsel for defense). Yes, sir.

The COURT. Three-fourths of a mile from Old Town, and a quarter and a half a quarter from the railroad, east; that puts it between the two towns, on the east side of the railroad.

Cross-examination by Mr. WM. M. CRAVENS:

Q. Where was it you got this drink after you and Tucker started out?

A. At Billy Wilson's, at the billiard hall; he has got a billiard hall; runs a billiard hall, and has got cider there.

126 Q. Didn't you call for a bottle of cider there?

A. Yes, sir.

Q. You got a bottle?

A. Yes, sir.

Q. A quart bottle?

A. Yes, sir; I guess so; somewheres near that.

Q. You and Marshal Tucker drank that?

A. Yes, sir; we drank maybe half of it, and I threw the other away.

Q. How much did it cost you?

A. Twenty-five cents.

Q. You drank half of it and threw half of it away?

A. Yes, sir.

Q. You were feeling pretty good, were you not?

A. No, sir; I don't think I was very much intoxicated.

Q. It was hard cider, was it not?

A. Yes, sir; I think it was.

Q. Why did you throw it away?

A. Because I didn't want any more of it.

Q. You didn't think you would ever want any more?

A. No, sir; I didn't feel like I wanted it.

Redirect examination — the ASSISTANT DISTRICT ATTORNEY:

Q. Did that intoxicate you?

A. No, sir.

Q. They do not allow them to sell intoxicating cider?

A. No, sir; it is right there, sold right over the counter all the time. If it was intoxicating I guess they would be taken up for it.

Recross-examination by Mr. WM. M. CRAVENS:

Hadn't they been selling lager beer right there?

A. Yes, sir; before that time.

The COURT. Nobody, I suppose, got drunk then.

(Witness excused.)

127 TENIE WILSON, having been duly sworn upon behalf of the Government, was examined by the assistant district attorney, Mr. William M. Meilette, and testified as follows, to wit:

Question. Your name is Tenie Wilson?

Answer. Yes, sir.

Q. Where do you live?

A. South McAlester.

Q. Are you a sister of William Wilson?

A. Yes, sir.

Q. Do you know Marshal Tucker?

A. Yes, sir.

Q. How long have you known him?

A. I have known him about two years. I wasn't personally acquainted with him until last September I got well acquainted with him.

Q. How did you get acquainted with him personally?

A. He was boarding at our house.

Q. At South McAlester?

A. Yes, sir.

Q. How long did he board at your house?

A. Three weeks.

Q. Where had you known him before that? Where had you seen him?

A. He had stopped at our house at Jenson when we were running a hotel there.

Q. Now, you remember the evening and the night that that woman was killed by the name of Lulu May? Do you remember the circumstance?

A. Yes, sir.

Q. Did you see Marshal Tucker on that evening?

A. Yes, sir.

Q. Tell where you saw him?

A. He ate supper at our house that night, the night when he came up there, Saturday night.

Q. He ate supper; then what did he do?

A. I don't know; he went off to town after supper, about half past seven, I guess.

128 Q. Did you see him any more that night?

A. Yes, sir; he came back about 9:00 o'clock; I suppose it was about 9; we didn't have any timepiece. I thought it was about 9 o'clock.

Q. What occurred then? Did he say anything when he came back?

A. Yes, sir.

Q. Just state what he said when he came back?

A. I don't know what he said, for I wasn't up when he first came back; I was in bed sick.

Q. Did you hear him say anything at any time when he came back that night?

A. Yes, sir.

Q. Tell the jury what you heard him say about this killing?

A. The first I heard him say, he had come in there and set down in a chair in the front room; when I first came in he was talking.

Q. Who was he talking to?

A. He was talking to my sister. She was the only one that was in the room. I had just come in after he did. He said he had got into some

trouble—no, he said first ther' had been somebody killed down in town, and they accused him of doing it. That was the first that he said.

Q. Go on from there and state all he said during that time. Did he say anything more about it after that?

A. He said there had been somebody killed, and they accused him of it.

Q. What else did he say, if anything?

A. He wanted to know if there was a train went out; he wanted to go home. I told him there was no train only on the Katy (M., K. & T.) and he said he did not want to go that way. He wanted to go home.

Q. What else did he say, if anything, during the time you were talking with him? Did he say anything else about the woman? If he did, just state what he said?

129 A. He said he was the one that done it, but not to give him away.

Q. Did you see any arms about him?

A. Yes, sir; his pistol.

Q. What became of it?

A. He gave it to my sister. He took it out and she told him to give it to her, and he just turned it over to her.

Q. Can you think of anything else he said?

A. No, sir.

Q. When you were asked by him if there was a train out you told him there was one on the Katy road, and he said he didn't want to go that way, he wanted to go home?

A. Yes, sir.

Cross-examination by Mr. Wm. M. Cravens:

Q. Do you know which way he went to go home?

A. On the Choctaw road, I suppose.

Q. The Katy didn't go towards his home, did it?

A. No, sir.

Q. When you speak of the Katy you mean the Missouri, Kansas & Texas Railroad?

A. Yes, sir.

Q. Your brother was arrested at the same day the defendant was, was he not?

A. No, sir; he never was arrested, I reckon, I don't know.

Q. Your brother never was arrested; never was put in jail?

A. Oh, yes; but I don't know whether he was ever arrested or not.

Q. He got in jail, you don't know whether he was arrested or not? He got in jail for this same killing, did he not?

A. Yes, sir.

Q. Are you older than your sister or younger?

A. I am older.

Q. You are older than Miss Belle?

A. Yes, sir.

130 Q. You say you were sick that night when Marshal came back.

A. Yes, sir.

Q. Were you in bed?

A. Yes, sir.

Q. Did you get up and dress yourself?

A. Yes, sir.

Q. You got up and dressed and went in where he was?

A. Yes, sir.

Q. And he said there had been somebody killed down in town, and he was accused of it?

A. Yes, sir.

Q. Was that all he said at that time? Did he not say he was accused of it, but he didn't do it?

A. He says, "There has been somebody killed down in town, and they accuse me of it," is the very words that he said.

Q. Didn't he say he didn't do it, that "I am not the one that done it?"

A. No, sir.

Q. Didn't you hear him say that to Miss Belle, your sister?

A. No, sir.

Q. He didn't say that?

A. I never heard it.

Q. I mean he never said it in your presence?

A. No, sir.

Q. He never said he hadn't done it?

A. No, sir.

Q. When he said there had been somebody killed *th*wn in town, and he was accused of it, did you ask him anything?

A. No, sir.

Q. Did your sister ask him anything?

A. I said, "You are mistaken Marshal; you just imagine you have." That is all I said to him.

Q. Did your sister say anything to him?

A. I never paid any attention to what she said.

Q. You just thought he was drunk, and didn't know what he was talking about?

131 A. I didn't think he did, and I was sick besides. I didn't feel much like talking. I didn't know what he had done, and I was sick anyway.

Q. You thought he was a good deal more drunk when he came back than he was at supper?

A. Yes, sir; he acted like it.

Q. He acted like he was a great deal drunker than when he went off?

A. Yes, sir.

Q. How was your brother William when he came back as to being intoxicated?

A. He wasn't drinking a bit, I don't reckon. He didn't seem like it.

Q. What time did your brother come back?

A. About 10:00 o'clock.

Q. Did you see Will Neal there that night?

A. Yes, sir; Willie Neal stopped at our house, was stopping there; he had been to bed.

Q. Will Neal took Tucker off, did he not?

A. Yes, sir.

Q. Had your brother got back—had you seen your brother before Mr. Neal took Tucker off?

A. No, sir.

Q. He didn't get there until after Will Neal took Tucker away?

A. No, sir.
Q. Where was your brother during this time, do you know?
A. No, sir.
Q. You do not know where he was?
A. No, sir.
Q. He wasn't at home?
A. No, sir.
Q. Now, the conversation first was that there had been somebody killed in town, and he was accused of it?
A. Yes, sir.
Q. And then you told him that he was excited and didn't know what he was talking about?
A. Yes, sir.
Q. And that is all you remember having said, then?
A. Yes, sir.
Q. How long now before the subject was brought up again of the killing?
A. It wasn't but a few minutes.

132 Q. How was it brought up, then? How was the subject brought up again?
A. He was talking about his poor mother.
Q. Was he crying about his mother?
A. Yes, sir.
Q. Could you give the conversation that took place then?
A. No, sir; I could not.
Q. You could not do it?
A. No, sir.
Q. You don't really know what was said, do you?
A. No, sir.

Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. Was your brother armed that night, do you know?
A. No, sir; there was not a gun on our place that I know of.
(Witness excused.)

133 The ASSISTANT DISTRICT ATTORNEY. I want 'his man Neal called. He has been a witness here, and we understand he has left town.

The COURT. Mr. Bailiff, call William Neal at the window.

The bailiff, after cal'ing William Neal, announced that he did not answer, and that he could find no one who had lately seen him.

The ASSISTANT DISTRICT ATTORNEY. If the court please, Mr. William Neal, is a Government witness who was here until night before last, and I would like to have the privilege of introducing him if he is brought here before the case closes. There has been an an attachment issued for him. I understand that he is in Paris, Texas. If the right can be granted I would like to have the privilege of introducing him should he be brought back.

The COURT. I will grant the privilege, provided it does not delay the case for an unreasonable time. If he comes here when the defendant gets

through with his evidence you may examine him, and they may have a chance to rebut his evidence, if he is brought here, and I do not think they can get back here during the trial.

Government rests.

134 Thereupon the defendant, to maintain the issues upon his part, produced the following witnesses: Stephen Ferrel, Charles Hankins, George Maxey, Marshal Tucker (the defendant), Earl Mattison, Andy Hendricks, admission of asst. dist. atty. as to date upon which killing occurred, testimony of Lillie Ibison and William Wilson taken before commissioner introduced and read in evidence by defense, Mr. George Foster, who each testified as follows:

135 *Testimony introduced by the defense.*

STEPHEN W. FERREL, having been duly sworn by the defense, was examined by Mr. William M. Cravens, and testifie' as follows, to wit:

Question. What is your full name?

Answer. Stephen W. Ferrel.

Q. Where do you live?

A. At Eufaula.

Q. In the Creek Nation?

A. Yes, sir.

Q. Do you know this young man, William Wilson?

A. Yes, sir; I know him when I see him. I saw him in jail the first time I ever saw him.

Q. You were in jail when he was put in there?

A. Yes, sir.

Q. How long were you in there with him, or do you remember about that?

A. About a week or ten days, I guess, before he got out.

Q. What was he in there for, do you know?

A. He was charged with murder, I think.

Q. He was charged with the murder of this woman, was he not?

A. Yes, sir.

Q. Do you know Marshal Tucker?

A. Yes, sir.

Q. He was put in with him, was he not?

A. Yes, sir.

Q. I will ask you if while in jail there you had any conversation with him about the killing of the woman?

A. Yes, sir.

Q. I will ask you to tell the jury just what he said.

A. Well, he said that him and Marshal Tucker went up to the house together; went up to the house and Marshal knocked on the door;

136 got onto the second step—as well as I recollect it—and about the time he knocked there was a report of a gun, and the ball passed his head, and Marshal did'nt sho't.

Q. Where did he say he was with refere'ce to Marshal?

A. He said he was right behind Marshal.

Q. There was a report of a gun passed his head?

A. Behind him, he said. He said he saw no flash of the pistol or nothing; only heard the report behind him, and the ball passed his head.

Q. Marshal doe' no shooting?

A. Marshal did not shoot, he said; he said he come down here as a witness for Marshal. He said he did not know he was going to be put in jail.

Q. He said he come down here as a witness for Marshal?

A. Yes, sir.

Q. And after he got here he was put in jail?

A. Yes, sir; that is what he said.

Q. Who wa' present when this conversation was had?

A. I could not tell you exactly; there was a good many 'f them; most of them have gone off; Tom Shepard was one of them.

Q. Do you know Charley Hankins?

A. Yes, 'ir.

Q. Was he present?

A. I think he was; I won't say positive, but he was there in the same cell.

Q. You are not positive; he was in the cell, b't you are not positive about his being present?

A. I think Charle' was standing off to one side; I won't be positive, but I think he was; we talke' about it several times.

Q. You and Wilson?

A. Yes, sir.

Q. Had you any acquaintance with Mr. Tucker before he was put in jail?

137 A. Yes, sir; I hadn't seen Marshal thought in a good many years; I used to know him when he was a boy.

Q. Where was that?

A. In Arkansas, down close to Hartford.

Q. Down in this county?

A. Yes, sir; Sebastian County.

Q. He was raised out near the foot of Sugar Loaf Mountain, was he not, in Sugar Loaf Valley?

A. Yes, sir.

Q. You knew his father, Uncle Ed Tucker?

A. Yes, sir; I had not see' him though in a good many years; I had not seen the old man for a good many years until I saw him here in town.

Q. Did Wilson tell you what condition Tucker was in as to being drunk or sober that night?

A. He said Marshal was drinking; he said they went up there to have a little fun.

Q. That is what he said they went for?

A. Yes, sir.

Q. And that he was behind Marshal?

A. He said he was right behind; he said Marshal stepped up on the second step, and Marshal knocked on the door, and before the door was opened the ball passed his head; the report was behind him, and he said Marshal did not shoot.

Q. What were you in the jail for?

A. They had me in there for incest.

Q. You are on bond?
A. Yes, sir.
Q. You have not had your trial, have you?
A. No, sir.
Q. Are you guilt' of incest?
A. No, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Were you drunk or sober when you were in the jail?
A. I was sober.
Q. How are you now?
A. I am sober.
138 Q. It is the first time since you have been here, is it not?
A. No, sir.
Q. I have been seeing you a great deal, and if you are sober this is the first time since you have been here?
A. You are mistaken.
Q. Eh?
A. You are mistaken. I got a little out of the way the first day I came in here.
Q. How long have you been here?
A. I came here Sunday night, and Monday I got a little——
Q. The first day was about 75 hours long, was it not, with you?
A. No, sir.
Q. Didn't you have to be attached in order to bring you here as a witness in a case you were a witness for the Government—a man charged with shooting you?
A. No, sir; I was down in the office talking with my lawyer. I came up here in the morning, and asked one of the lawyers, asked him if they were going try the case right away, and he said he didn't know when it was coming up.
Q. You were a witness in an assault case, a witness for the Government, a man charged with shooting you?
A. Yes, sir.
Q. What became of the man?
A. He came clear.
Q. Now, you are charged with incest, for having sexual intercourse with your daughter?
A. Yes, sir.
Q. You have been indicted by the grand jury?
A. Yes, sir.
Q. Bound over by the commissioner?
A. Yes, sir.
Q. Now, you are under bond ready for trial, to be tried this court?
A. Yes, sir.
Q. I suppose you were paying more attention to other people's
139 cases than you were to your own, when you were over there in the jail.
A. No, sir; that was his own conversation.
Q. You knew nothing of the circumstances, except what you heard from him?

A. No, sir; not a word. I didn't know nothing about it.

Q. You understood the law of the case well enough to remember everything that he said, and just exactly the language?

A. I know just exactly what Mr. Wilson said.

Q. What made you remember it?

A. I know what a man talks to me.

Q. Did he tell you what woman was killed?

A. I don't remember her name.

Q. Have you ever been arrested before? How many times have you been arrested?

A. I have not been arrested at all.

Q. You have been arrested here for incest?

A. Yes, sir.

Q. How many other times have you been arrested?

A. I have not been arrested at all that I know of.

Q. You know whether you have or not?

A. Yes, sir.

Q. Haven't you been arrested in this county?

A. Yes, sir.

Q. What made you tell me you hadn't been arrested?

A. I thought you meant by this court. I have paid little fines. I was never arrested in any charge only having a little racket or fuss.

Q. You are a kind of a rattle-brained fellow anyhow, ain't you?

A. No, sir; not when I am sober, I am not.

Q. You took it upon yourself to investigate this Tucker killing, didn't you?

A. No, sir; I didn't investigate nothing, I only just heard Mr. Wilson say that.

Q. And you paid very strict attention to that, did you?

140 A. I knew just exactly what he said, because a man could not help it when he talked it as often as he did——

Q. He talked it a great deal, did he?

A. Yes, sir; he talked every day.

Q. Who was present when the conversation took place?

A. As I remember, at one time him and Shepard and I was talking together.

Q. Tom Shepard?

A. Yes, sir.

Q. He has gone to the "pen"?

A. Yes, sir.

Q. You are going?

A. I can not tell you.

Mr. CRAVENS (of counsel for defendant). You are not going on purpose, are you?

The WITNESS. No, sir.

The ASSISTANT DISTRICT ATTORNEY. Where was Marshal Tucker?

A. He was in a different cell. Marshal and that boy never did talk together at all in my presence.

Q. About when was this?

A. It was along in October, Mr. Mellet.

Q. How long did you stay in jail?

A. I stayed there a little over two months.
Q. When did you get out on bond?
A. Along in December.
Q. What time in October was it?
A. I could not tell you the exact time, because I was not keeping the time, but sometime in October.
Q. About what time in October?
A. I could not tell you the date.
Q. You are certain it was in October?
A. I think it was, to the best of my knowledge.
Q. You think it was?
A. I am pretty confident it was in October that we had the conversation.

141 Q. As near as you can get at it, you just think it?
A. Yes, sir.

Q. Will you put it you are sure it was in October?
A. No, sir; I won't say positive whether it was October or not.
Q. It was October or November, was it not?
A. It was in October, as well as I recollect.
Q. If it was not in October it was in November, was it not?
A. I think it was in October, Mr. Mellette, to the best of my knowledge.
Q. If it was not in October, what month was it in?
A. In November, I guess, would be the next.
Q. If it was not in October it was in November? It was while you were in jail, and while he was there?
A. Yes, sir; it was while were in there together we had that talk.
Q. While you were in the jail?
A. Yes, sir.
Q. Were you in the cel' with him?
A. No, sir; did not.
Q. Were you in his cell?
A. We were together every day from 6:00 o'clock in the morning until 6:00 o'clock in the evening.
Q. You staid right with Wilson, did you?
A. No, sir; not at all the times.
Q. You listened to everything that he said?
A. Yes, sir; a man could not help it if he was talking.
Q. You renewed your acquaintance with Tucker after he got in jail, did you?
A. No, sir; I knew him when he came in.
Q. Did Marshal Tucker send you to this man to pump him?
A. He did not.
Q. To find out what he knew about the case?
A. No, sir; he positively did not.

142 Q. Did he get you to see him for him?
A. No, sir; he did not.

Q. Although you knew Marshal Tucker, and talked to him when he came in the jail there?
A. Yes, sir; I don't know anything, only just what Mr. Wilson said, about the case.

Q. When did you find that out?

A. I didn't find that out until he came in the jail.

Q. You didn't find that out until about yesterday noon, that you ever knew such a thing, did you?

A. No, sir.

Q. Isn't that the first time you ever told anybody such a thing, was on yesterday noon?

A. No, sir.

Q. Isn't that the first time you told the attorneys in this case you knew anything about it since this case began?

A. The day before that.

Q. Was it since the father of this defendant came here?

A. Yes, sir.

Q. You knew his father?

A. Yes, sir.

Q. And it is since the father of this defendant came?

A. Yes, sir.

Q. How did the father of the defendant find out you knew anything about this case?

A. I told him what Wilson said.

Q. How did you happen to tell him?

A. I just told him.

Q. You went to him and told him, did you?

A. Yes, sir.

Q. When did you tell him?

A. Day before yesterday; I think it was day before yesterday, Tuesday; I am not certain, but I think it was Tuesday; I believe that is the day.

Redirect examination by Mr. WM. M. CRAVENS:

143 You are charged with incest. I will ask you if you are not ready and been demanding trial?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. He will get a trial; he was not very anxious last court.

Mr. CRAVENS (of counsel for defendant). You are not related to Tucker or any of the Tuckers?

A. No, sir; none of them. I never saw Wilson until I saw him in the jail. I am no relation to him at all.

Q. You had no interest in this except to see justice done and to tell the truth about it?

A. That is all.

Q. You say you live at Eufaula; how long did you live in this county before you went up there?

A. I was married in 1874, and went out there in 1883, I think.

Q. How long did you live in this county?

A. From 1874 to 1883.

Q. You lived here 9 years?

A. Yes, sir.

Recross examination by the ASSISTANT DISTRICT ATTORNEY:

Q. How many times were you arrested in this county during these 9 years?

A. I might have been two or three times.
Q. Don't you know you were arrested two or three times every year?
A. No, sir.
Q. You have been arrested in this town, haven't you?
A. Yes, sir.
Q. You got arrested in this town and put in the lockup once or twice?
A. Two times, I think.
Q. Put in the lockup?
A. Once I was, I think.
144 Q. What was that for?
A. Fourth of July celebration here.
Q. What was the other time?
A. I got a little tight.
Q. Was that Christmas?
A. No, sir.
Q. It was just between times?
A. Yes, sir.
Q. Between the Fourth of July and Christmas?
A. Yes, sir.
Q. That is twice here. How many times have you been arrested at Greenwood?
A. I had a fight with two fellows down there. I was running a little shop down there, and they would not pay me, and we had a racket over it.
Q. How many other times have you been arrested?
A. I have not been arrested at all.
Q. Have you *have* been arrested down there twice?
A. Once or twice.
Q. You ought to know whether it was once or twice.
A. It is just what I am telling you.
Q. Was it once or twice?
A. I think it was twice. The men would not pay me, and——
Q. You wil' swear that twice is all you have been arrested in Greenwood?
A. I am not positive; I never kept these little cases in my mind.
Q. You are not certain you were arrested just twice?
A. I think that is all.
Q. You got fined on the docket twice?
A. Yes, sir.
Q. It seems to me if you could swear what a man said about a case you had no interest in you could surely swear how many times you have been arrested in the Greenwood district of this county.
A. I can not recollect ten or fifteen years back.
Q. I say if you can remember well enough to detail a conversation——
145 A. I recollect when a man tells me what he knows about anything to be the facts.
Q. I understand what you are testifying about now, but if I want you to swear how many times you have been arrested in the Greenwood district of Sebastian County——
A. I don't think but twice.
Q. You swear positively it is twice, do you?

A. That is the best of my recollection.
Q. You will consent to stick to that?
A. Yes, sir; to the best of my recollection.
Q. You can not be mistaken about that?
A. Well, I might be.
Q. Have you ever been arrested more than that; and, if so, what have you been arrested for?
A. Nothing; only just as I told you, for having little rows.
Q. I think it is a matter you ought to fix distinctly on your mind; surely, if a man has been arrested he can tell how many times he has been arrested.
Mr. CRAVENS (counsel for def'nse). Can you tell how many times you have had fights?
The ASSISTANT DISTRICT ATTORNEY. Yes, sir; if I had ever been arrested I could always tell it; I would remember it the longest day I ever lived. (To the witness.) You can not state, then, exactly, how many times you have been arrested?
A. No, sir; because I had a shop down there, and in the fall of the year I had several fights down there—three or four—and I paid two or three fines before a justice of the peace.
Q. What other parts of the county did you do anything?
A. I didn't do anything, only right at Fort Smith and at Greenwood.
Q. You have paid several at Greenwood and several here?

146 Redirect examination by Mr. WM. M. CRAVENS:

Q. You say you were arrested in the Greenwood district and once or twice here in Fort Smith?
A. Yes, sir.
Q. Once for slopping over on the Fourth of July?
A. Yes, sir.
Q. You got a little too much the Fourth of July?
A. Yes, sir.
Q. And another time for getting a little drunk in town?
A. Yes, sir.
Q. Now, you were running a blacksmith shop at Greenwood district, Sugar Loaf Valley?
A. Yes, sir.
Q. You were trying to collect your debts in the valley and they would not pay them, and you got into some little rackets over them?
A. Yes, sir.
Q. And you were arrested, and paid your fines?
A. Yes, sir; I did.
Q. That is the sum and substance of that, is it?
A. That is all there is to it.
(Witness excused.)

147 CHARLES HANKINS, having been duly sworn upon behalf of the defendant, was examined by Mr. William H. Cravens, and testified as follows, to wit:

Question. Your name is Charles Hankins, I believe?
Answer. Yes, sir.

Q. Do you know William Wilson?
A. Yes, sir.
Q. Were you in jail with him?
A. Yes, sir.
Q. I will ask you if you had a conversation with him while in jail in reference to the killing that was charged on Tucker.
A. Yes, sir; I did.
Q. I will get you to state just what he said about it.
A. Him and I were talking about the shooting at McAlester, and I asked him if he had any idea who it was done the shooting, and he said he hadn't, and he said the shot came in from behind somewhere, and he didn't know where; he had no idea who done the shooting.
Q. The shot came in from behind somewhere?
A. Yes, sir.
Q. When was this that this conversation took place?
A. That was two or three days after he was put in jail; him and I were in the cell together talking about it.
Q. He said he had no idea who did the shooting?
A. Yes, sir.
Q. That the shot came in from behind?
A. He just made the remark, he says, "The shot came in from behind somewhere; I don't know where."
Q. That was two or three days after Wilson was put in jail?
A. Yes, sir; as well as I remember, it was a short time afterwards.
Q. Did you have more than one conversation with him about it?
A. Yes, sir; we talked about it several times.
148 Q. Did he ever claim to you that Tucker had done the shooting?
A. No, sir.
The ASSISTANT DISTRICT ATTORNEY. I object to that.
Mr. CRAVENS (of counsel for defense). I will ask you if he said whether or not Tucker did the shooting?
The ASSISTANT DISTRICT ATTORNEY. That is leading.
Mr. CRAVENS (of counsel for defense). I asked Mr. Wilson if he did not tell this witness——
The COURT. You ask this witness what he said. This is an impeaching witness, and the rule ought to be strictly followed.
The WITNESS. The way that came up, I asked him how he thought Mr. Tucker would come out, and he said, "I don't know;" he says, "I can't swear anything at all that will hurt him." He says, "I am going to swear the truth."
Mr. CRAVENS (counsel for defendant). You are held in jail now, are you not?
A. Yes, sir.
Q. Upon what?
A. I was charged with murder, and I am held there now for manslaughter.
Q. You were convicted of manslaughter?
A. Yes, sir.
Q. You were a deputy marshal engaged in making an arrest in the Indian country and killed a man?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. There is no use in going into his case.

Mr. CRAVENS (counsel for defendant). That was the way in wh killing took place—in making an arrest?

A. Yes, sir.

Q. You were convicted of manslaughter?

A. Yes, sir.

Q. Where were you from into the Indian country?

A. From Wagoner.

149 Q. Where did you go from when you went up there? Where were you raised?

A. I was partly raised in this county; 23 years since I came to this county.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You are under conviction of manslaughter?

A. Yes, sir.

Q. Did you know Marshal Tucker?

A. Yes, sir.

Q. How long have you known him?

A. About 6 or 8 years; I do not remember.

Q. Was your case tried at the time you had this conversation?

A. No, sir.

Q. Didn't you have enough to do thinking about your case; or did you have to go around and investigate other people's cases?

A. I wasn't particularly investigating the case; of course, I was anxious to find out all I could about it.

Q. Why?

A. I always want to know whenever anybody comes in; I am always asking about it.

Q. You keep run of what everybody said about their own cases and your case, too, and everything that anybody said about his case, you remembered that?

A. No, sir; not everything.

Q. You seem to have remembered what Mr. Wilson said.

A. We were talking about it several times.

Q. What lawyers represented you in your case?

A. Colonel Cravens, and Col. Forrester, and Mr. Mullen.

Q. You are in jail now, with Marshal Tucker?

A. Yes, sir.

Q. You have been in jail with him ever since that time?

150 A. Yes, sir.

Redirect examination by Mr. WILLIAM H. CRAVENS:

Q. Were you ever tried for anything but this?

A. No, sir; I was arrested once for playing a game of poker; I plead guilty and paid a fine.

(Witness excused.)

151 GEORGE MAXEY, having been duly sworn upon behalf of the defense, was examined by Mr. W. M. Cravens, and testified as follows, to wit:

Question. Your name is George Maxey?

A. Answer. Yes, sir.

Q. Where do you live?

A. I live at Tahlihina, Choctaw Nation.

Q. Where were you last September, September, 1892?

A. I was around South McAlester right smart of the time.

Q. At South McAlester?

A. Yes, sir.

Q. I will ask you if you were there at the time Lulu May is said to have been killed?

A. Yes, sir.

Q. Where were you on the night she is said to have been killed?

A. I was at South McAlester.

Q. Where were you precisely at the time she was shot?

A. I was there in about 40 or 50 feet of where she was shot,

Q. Now, what were you doing there? Where had you gone from?

A. I had come from town, from the hotel. I was knocking around.

Q. From South McAlester?

A. Yes, sir.

Q. Where were you going?

A. I was going up there to see the girls.

Q. What did you see when got up there?

A. I heard Tucker talking pretty rapid and cross, and I slipped up as close as I could to see what was going *in*, and about the time I got up—I was behind a little post oak tree—there was a pistol fired.

Q. You heard Tucker talking pretty rapid, and you slipped up.

Mr. MELLETTE (assistant district attorney). He said he h'ard

152 Tucker talking pretty rapid and cross.

Mr. CRAVENS (of counsel for defendant). Rapid and cross. You slipped, you say, up where you could see, and about the time you got up behind a little tree the pistol fired?

A. Yes, sir.

Q. Where did it fire from?

A. It fired from behind Tucker.

Q. How was Tucker located with reference to the door at the time the pistol fired?

A. Tucker was a little to the left of the door. He had one foot up on the step, and this shot was from behind him.

Q. How could you tell that the shot was from behind?

A. I could see the blaze of the pistol, the flash; and I saw the man that had hold of it.

Q. Which was the larger of the two men, Tucker or the other man; which was the taller?

A. Tucker was the tallest man.

Q. Did you know Tucker at that time?

A. I knew him when I saw him, and that is all.

Q. Did you knew William Wilson?

A. I knew him when I seen him, and that is all.

Q. You just knew them by sight?
A. Yes, sir.
Q. Did you know who they were when you saw them there?
A. Yes, sir.
Q. Did you recognize them?
A. Yes, sir.
Q. You knew it was Tucker and Wilson?
A. Yes, sir.
Q. Who was it done the shooting?
A. Mr. Wilson done the shooting.
Q. And he was behind Tucker at the time?
A. Yes, sir.
Q. What was done then? Just describe the whole thing.
A. When the pistol fired, as quick as the pistol fired, this fellow walked up and handed Tucker the pistol, and Mr. Tucker punched on the
153 door with it two or three times, and made some remarks; told them to open the door.
Q. Was the door opened, and what was done? Just tell all about it, and what was done.
A. After he knocked on the door some one opened the door. I didn't know there was any one hurt at the time myself.
Q. What did you do?
A. I went on away; got away as quick as I could. I didn't know but what I might get hurt myself, and I went away as quick as I could possibly.
Q. Where did you go to?
A. I went from there over to Old Town.
Q. To McAlester?
A. Yes, sir.
Q. When did you learn that the woman was shot?
A. The next day.
Q. You had not heard it until the next day?
A. No, sir.
Q. Where did you hear it; where were you when you heard it?
A. I was at McAlester.
Q. At New Town?
A. Yes, sir; I went from Old Town next morning over to New Town.
Q. Where did you hear it?
A. New Town.
Q. You did not hear about it until you went over to New Town?
A. No, sir.
Q. What time did you go over there next morning?
A. Betwixt 10 and 11 o'clock, I guess; somewhere along there.
Q. How long had you been in South McAlester by this time?
A. I don't know just exactly how long. I had been there several days.
Q. Where had you been boarding?
A. Boarding at Mr. Wilson's a part of the time; three or four
154 or five days, or somewheres along there; and I boarded at Pat's—I can't think of his name.
Q. Did you have any other boarding place?

A. Yes, sir; I boarded at Pat's—I can't think of his other name—four or five or six days.

Q. You do not know Pat's second name?

A. No, sir.

Q. You boarded with him awhile?

A. Yes, sir.

Q. Where were you boarding with him?

A. At South McAlester.

Q. Where were you boarding at the time this killing occurred?

A. At Pat's.

Q. You say, now, you went to old McAlester?

A. Yes, sir.

Q. What were you doing at McAlester?

A. Well, sir, I went up there to see some lawyers. I had a case of my own to attend to.

Q. What were you charged with?

A. I was charged with carrying a pistol.

Q. You had gone up there to see some lawyers, and you were charged with carrying a pistol?

A. Yes, sir.

Q. Where did you live at that time?

A. At Tahlihina.

Q. Who arrested you for carrying a pistol?

A. Mr. Miner; Sam Miner.

Q. What became of your case finally?

A. Well, sir, finally I went and plead guilty to it and served out my time in jail.

Q. Where?

A. At Muskogee.

Q. Have you seen Marshal Tucker, the defendant, since that night?

A. No, sir; not until I seen him over at the jail just a little before Christmas.

Q. Did you have any conversation with him then?

A. No, sir.

Q. When did you first make known that you had seen this; to whom did you first communicate the fact?

A. The first time I said a word about it anyway I told Mr. Tucker there.

155 Q. Which Tucker?

A. Uncle Ed. Tucker.

Q. Ed. Tucker there, the defendant Marshal's father?

A. Yes, sir.

Q. You told him about it the first you told anyone?

A. Yes, sir.

Q. You call him Uncle Ed.; is he any relation to you, any akin?

A. No, sir; no kin to me.

Q. He is just known as Uncle Ed. Tucker?

A. Yes, sir.

Q. That is the reason you call him uncle Ed.?

A. Yes, sir.

Cross-examination by Mr. W. M. MELLETTE, assistant district attorney:

Q. Where did Uncle Ed. see you?

A. Here in town.

Q. When?

A. I don't know exactly when; it was here two or three weeks ago, though.

Q. Two or three weeks ago, was it?

A. Yes, sir.

Q. Was that the first time you told a living man that you ever was about that place where that shooting place—when it took place, sir? Answer me that? When was that?

A. I don't know; it was here the other day.

Q. Well, when; when did you get out of jail at Muskogee?

A. I got out of jail at Muskogee about—let's see—it was the 22nd of this last month.

Q. The 22nd of February?

A. Yes, sir.

Q. How long did you stay in Muskogee—how long did you stay there after you got out of jail?

A. I staid there 22 days in the Muskogee jail.

Q. How long did you stay there after you got out of jail, in
156 Muskogee?

A. I didn't stay there any time; I pulled out right away.

Q. Where did you pull to?

A. I came here.

Q. You pulled here?

A. Yes, sir.

Q. You got out of jail there on the 27th?

A. No, sir; I got out on the 22nd.

Q. Of February?

A. Yes, sir.

Q. 22nd of February?

A. Yes, sir.

Q. How did you happen to tell Mr. Tucker what you know about the case?

A. Well, because I thought it was right to tell it.

Q. Where were you after this thing occurred?

A. I went from there to Old Town.

Q. Where did you go the next day?

A. I went to McAlester, to New McAlester from Old Town.

Q. Did it not occur to you then that you ought to have told who did this shooting?

A. No, sir; I didn't know that; I did not want to have my name in it.

Q. You wanted to keep your name out of it?

A. Yes, sir.

Q. Your name is very valuable to you, is it not?

A. Well, a little.

Q. It is a very valuable thing, your name, is it not?

A. I reckon it is.

Q. You wanted to keep your name out of it, and you did not tell anybody?

A. No, sir.

Q. When you were there and saw that shooting, when Marshal Tucker was arrested and brought down here, you told no one that you knew anything about it?

A. No, sir.

Q. You did not mention it?

A. No, sir.

157 Q. You heard people talking about the shooting, didn't you?

A. Yes, sir; I heard a few talking about it.

Q. Did you see Marshal Tucker and Wilson under arrest?

A. No, sir; I did not.

Q. You knew they were both arrested and brought to Fort Smith?

A. Well, I heard they were; I didn't know they were.

Q. You heard they were brought here. How long did you stay in South McAlester after that?

A. After that I staid there a day or two; two or three days; I don't remember which.

Q. Where did you go then?

A. I went back home.

Q. To Tahlihina?

A. Yes, sir.

Q. How long have you known Marshal Tucker?

A. I have seed him off and on for two or three years.

Q. Where did you see him?

A. I have not been personally acquainted with him.

Q. Where did you see him?

A. I saw him passing around, first one place and then another.

Q. Whereabouts?

A. Tahlihina and Poteau; first one place and then another.

Q. What are you doing travelling around?

A. Just the same as anybody else.

Q. What was your business?

A. First one thing and then another.

Q. What is first one thing and then another?

A. I haven't got any personal business.

Q. You never worked any in your life, did you?

A. Yes, sir.

Q. What was the first one thing and then another you did?

A. I have worked on a farm right smart.

Mr. GRAVENS (of counsel for defendant). You worked on a railroad, too, didn't you?

A. Yes, sir.

158 Mr. MELLETTE (assistant district attorney). You say you did not have any particular thing to do; is that so?

A. Yes, sir.

Q. You didn't have any particular work to do, you say?

A. Well, sometimes I had particular work to do, and sometimes I didn't.

Q. Where did you live before you moved to Tahlihina?
A. Poteau Switch.
Q. How long did you live there?
A. I have lived around there——
Q. I am not talking about around there. About how long did you live at Poteau Switch?
A. I lived there two or three years.
Q. In Poteau Switch?
A. No, sir; not right in Poteau Switch.
Q. What were you doing there?
A. I was farming with my uncle?
Q. Did you ever live anywhere else besides Poteau?
A. Yes, sir; I lived at Tahlihina.
Q. Any other place?
A. As far as that is concerned, I have lived most everywhere, for everywhere I am at work I call that my home.
Q. Tell us some of the places you have lived. Where have you lived except Tahlihina and Poteau? You have lived almost everywhere, you say; now give us some of the places you have lived.
A. I have lived around both places, of course——
Q. Tell us some of the places you have lived?
A. With my uncle and with my cousins, and so forth.
Q. Tell us the places where you have lived?
A. I have told you as near as I know.
Q. You have told you lived at Poteau three years and then you lived at or about Tahlihina, and you have lived there about a year and a half; now tell us where else have you lived.
159 A. I have lived just first one place and then another where ever I have been at work.
Q. Where have you been at work?
A. I have been at work at Judge Dukes' part of the time, and I have worked for my brother-in-law.
Q. Where is that?
A. My brother-in-law lives a mile east of Tahlihina, and Judge Dukes lives four miles east.
Q. How long have you lived about Tahlihina?
A. Three years, about.
Q. That is after you left Poteau?
A. Yes, sir.
Q. There is six years of your life we have got down; where did you live before that?
A. I have lived most everywhere.
Q. Tell us some of the places you have lived.
A. Most everywhere. I was raised around Cameron.
Q. Were you ever raised at all, now?
A. I reckon I was, or I would not have been here.
Q. You were raised around Cameron; were you born down there?
A. No, sir.
Q. Where were you born?
A. I was born in Mississippi.
Q. When did you come from Mississippi?

A. I don't know; I was pretty small when I came to this country.
Q. Where did you go to when you came from Mississippi?
A. I came to the Choctaw Nation.
Q. To Cameron?
A. Yes, sir.
Q. Were the Tuckers living about Cameron about the time you came there?
A. I don't know.
Q. Where did you get acquainted with old man Tucker?
A. I got acquainted with him here in town.
160 Q. This is the first time you ever saw him?
A. No, sir; I have seen him lots of times, of course; I have never been personally acquainted with him.
Q. When did you first become personally acquainted with him?
A. Right here lately.
Q. Have you ever been subpœnaed as a witness in this case?
A. I reckon I have.
Q. When were you subpœnaed?
A. Yes, sir; I was subpœnaed yesterday.
Q. You never was subpœnaed until yesterday, were you?
A. No, sir.
Q. Did you ever tell anybody that you knew anything about this case until yesterday?
A. Yes, sir.
Q. Has anybody had any notice on earth that you ever knew anything of this case until yesterday?
A. Yes, sir.
Q. Don't you know it is false?
A. No, sir.
Q. That nobody knew anything of this case until yesterday from you—that you didn't know anything of it until yesterday?
A. Of course there was several knew I knew it before yesterday.
Q. Who has been paying your board here in town until yesterday?
A. I have been paying it myself.
Q. Where did you get the money?
A. I worked to get the money.
Q. Where did you get it; tell us where you got it, who from?
A. I got it from my brother-in-law.
Q. Who is your brother-in-law?
A. Bynum Wade (?).
Q. Why did you lay at the jail at Muskogee if you had money to pay your fine?
A. Oh, well, anybody is liable to do that.
Q. You thought you would make more money lying in jail than you could outside, did you?
A. Well, of course——
161 Q. I will ask you if Mr. Tucker has not paid your board, furnished you money?
A. No, sir.
Q. How much money did you have when you got out of jail?

A. I didn't have any; I have had money sent to me since I have been here.

Q. Your brother-in-law has supported you while you are around here doing nothing?

A. No, sir.

Q. You have not been working a lick since you have been here, have you?

A. No, sir.

Q. How long have you been here?

A. Some two or three weeks.

Q Do you think it has been two weeks or three weeks?

A. I don't know; it has been some two or three weeks though.

Q. You have not worked a lick, have you?

A. No, sir.

Q. Your brother-in-law sends you money to keep you idle, does he?

A. No, sir.

Q. Who served the subpœna on you in this case?

A. I don't know who he was.

Q. You were never subpœnaed as a witness in this case, were you?

A. Yes, sir.

Q. You were never applied for as a witness, were you?

A. I do not know.

Q. Here is the application for witnesses. How did it happen you were not subpœnaed until yesterday?

A. I don't know how it happened.

Q. You had not let anybody know what you knew, did you; that you were going to testify about anything in this case; you wanted to keep that quiet, didn't you?

A. Yes, sir.

Q. You wanted to keep everything down, and you did not want
162 to give notice you were going to be a witness in this case, sir. You were there when this shooting took place; you swear that is true?

A. Yes, sir.

Q. You didn't want to give notice you were there and seen that?

A. Yes, sir.

Q. That is the reason?

A. Yes, sir.

Q. You were keeping it secret, were you not?

A. Yes, sir.

Q. You admit you were keeping it secret?

A. Yes, sir.

Q. Why were you keeping it a secret?

A. Well, just because I knew there wasn't any use telling it to 'verybody.

Q. You wanted to keep it secret, did you?

A. Yes, sir.

Q. Who told you to keep it secret?

A. Nobody.

Q. Why were you not subpœnaed until yesterday then?

A. I don't know.

Q. Didn't Mr. Tucker tell you to keep it secret?

A. No, sir; he didn't.

Q. Why were you not applied for as a witness in this case, as the other witnesses have been?

A. Because I didn't tell it.

Q. You have been lying until—well, you say you told it two weeks ago?

A. I know, but I told it to Mr. Tucker. I never told it to anyone else.

Q. Two weeks ago?

A. Yes, sir.

Q. Why have you been lying idle around this town two weeks? Why have you not been drawing Government pay as a witness for the defense?

A. I don't know why.

Q. Do you swear that you have been here and paying your expenses that long?

A. Yes, sir.

Q. That your brother-in-law has sent you money here?

A. Yes, sir.

Q. He must be an exceptionally good brother-in-law; I would
163 like to have three or four of that kind. Do you not think they are very valuable?

A. I suppose they are.

Q. You think they are very valuable; you would hate to loose him, wouldn't you?

A. Yes, sir; of course I would.

Q. You would starve?

A. I don't suppose I would starve if I was to loose him.

Q. I think it would be a good thing if you would. And you say you kept it a secret?

A. Yes, sir.

Q. Now, you started out that night from South McAlester to have a little fun?

A. Yes, sir.

Q. And you started up to the place where this shooting occurred?

A. Yes, sir.

Q. Which way did you go when you started from South McAlester?

A. I started over towards that ridge.

Q. Where did you leave from?

A. I left from Pat's—I can not think of the surname. He runs a hotel at South McAlester.

Q. In the first place, do you not remember you were not in McAlester when this thing occurred?

A. Yes, sir; I was right there.

Q. Don't you know you were not there?

A. I know I was there.

Q. And is not that the reason you have been keeping this thing a secret from the Government so the Government could not disprove it by sending down there after testimony; is not that the reason you have been keeping it a secret?

A. I don't know.

Q. You were not subpœnaed until yesterday, and isn't that the reason? You have given no reason; I want you to give one, why you kept this thing secret.

A. Because I didn't want to be testified in this case.

164 Q. Why?

A. I didn't want to give any evidence on nary side.

Q. Why did you go to Mr. Tucker if you did not want to testify in the case, if you wanted to keep your name out of it?

A. Because I didn't want to see an innocent man suffer if I could help it.

Q. If you did not want to see an innocent man suffer why did you not tell it at the time this thing occurred and you knew they would be brought here?

A. I don't know why it was I didn't, but I wasn't the one to tell it.

Q. I will ask you again if the reason you didn't tell it was because you knew we would send for witnesses to prove where you were on this day and night; is not that the truth about it?

A. I don't know whether it is or not.

Q. You don't; well, isn't that it? Be honest for once in your life.

A. I am honest.

Q. You don't know whether that is true or not, that you kept it secret so we could not send down there for evidence—testimony to show where you were; if you don't know whether that is true or not it is probably true?

A. I know that is not the truth.

Q. You have changed your mind on that, haven't you?

A. No, sir.

Q. You have changed your mind about that thing, have you not?

A. No, sir.

Q. Now, you say you left Pat's to go up to the place of the shooting. Now, where was that, and when was it?

A. It was on Saturday night, and it was the 15th of October.

Q. The 15th of October?

A. Yes, sir.

Q. How often had you been at that house before?

165 A. I had not been there; I had not boarded there at all before.

Q. How many times had you been up on that hill before?

A. I had been there some two or three times.

Q. Two or three times?

A. Yes, sir.

Q. How long before that had you been there?

A. Had been about a month or so, I reckon, that I had been there.

Q. Were you acquainted with those women?

A. No, sir; I am not to say acquainted with them. I know when *when* I saw them, though.

Q. Where had you met them?

A. I seen them over at South McAlester.

Q. What women had you seen up there at that house on the hill before the killing?

A. I don't know their names; I just knew them when I see them.

Q. These women who are here?

A. Yes, sir; two of them.

Q. That is Fannie Orwig and Lillie Ibison?
A. Yes, sir; I reckon that is their names.
Q. You had seen them up there about a month before, had you?
A. Yes, sir.
Q. Had you been there before that, then?
A. No, sir; I had not.
Q. How many times had you been there; you say three or four times before this night?
A. I had been there off and on three or four times.
Q. When was the off and when was the on?
A. I could not tell you that.
Q. You could not?
A. No, sir.
Q. Let's have it now; when were you up there?
A. I could not tell you when it was, but it was along there some where.
166 Q. You say about a month before that you had been there three or four times before this night?
A. Three or four times before the shooting.
Q. About a month before that you had been up there and saw Fannie Orwick and Lillie up there, about a month before?
A. Yes, sir.
Q. When was the other times you were up there before the shooting?
A. Well, two or three times before the shooting took place I was there.
Q. That is twice only you were there before?
A. I was there, but I could not tell you when it was.
Q. Had you been up there before that time, about a month before?
A. I don't know what you mean by that?
Q. Well, you say you have been there three or four times—you were there three or four times before the killing—and you have said you were up there a month before the killing; now name another time you were up there.
A. I don't know exactly how many times I had been there. I had been there several times, though.
Q. When were you up at that house again?
A. I could not tell you; I was there, but I don't remember.
Q. Was it that trip you had made to McAlester?
A. Yes, sir.
Q. You had been there three or four times that trip?
A. No, sir; I had been there about two or three times that trip.
Q. You had been in McAlester about four or five days that trip?
A. Yes, sir.
Q. How long did it take you to see your lawyers?
A. It did not take me no time, as far as that is concerned.
Q. What were you doing around McAlester?
A. I was not doing anything, really; just hanging around.
167 Q. Are you a gambler by profession?
A. No, sir.
Q. Do you gamble for a living?
A. No, sir.
Q. How did you live at South McAlester?
A. I paid for my living.

Q. How did you get the money?
A. Well, I worked part of the time.
Q. Where?
A. On a railroad and on the farm.
Q. What did you do on the railroad?
A. Worked on the section.
Q. Now, you say a month before that you had been up to that place and saw Little Orwick up there. You are certain of that, are you?
A. I don't know their names.
Q. Well, these two women out here?
A. Yes, sir.
Q. Now, don't you know that one of these women had not been there but a week at the time this shooting occurred?
A. Yes, sir; she was there——
Q. Don't you know Fannie Orwick had not been there but a week—the oldest one; the tall and slender one?
A. Well, I seen her there; she was there, anyhow, at the time I saw here there, and at the time I was there, a month before that.
Q. You are certain she was there a month before that when you were there?
A. Yes, sir.
Q. Now, you started up there; how did you go that night when you started up there?
A. I just went; that is all.
Q. What road did you take?
A. I took the road from the Mountain House; came straight across the ridge.
Q. Did you strike the McAlester road over there, the Old Town road?
A. No, sir.
Q. You came straight up to her house, did you?
A. Yes, sir; I didn't go right to the house; I went right close
168 to the house, though.
Q. You were crawling along on all fours, were you not?
A. No, sir.
Q. Were you not down, playing the dog, along there, crawling?
A. No, sir.
Q. Wanting to see something?
A. No, sir; I was not crawling.
Q. You got up there and got behind a tree?
A. Yes, sir; I heard Mr. Tucker talking pretty cross——
Q. Pretty cross?
A. Yes, sir.
Q. You were forty or fifty feet away?
A. Yes, sir.
Q. How many times had you seen Tucker before that?
A. I had seen him several times before that.
Q. How many times?
A. I don't know; I have seen him off and on all my life, nearly.
Q. You have known hi' all your life?
A. No, sir; not all my life. I said I have seen him off and on pretty near all my life.

Q. That "off and on" seems to be a great expression of yours; you knew him well enough to know his voice, did you?

A. Yes, sir.

Q. You saw him up there; could you tell it was him by his voice or seeing him?

A. I could tell by his voice; and I could tell when I saw him who it was.

Q. You could tell the distance you were from him who it was?

A. Yes, sir.

Q. Forty or fifty feet?

A. Yes, sir.

Q. How far is forty or fifty feet; as far as from here to the other end of the house?

A. It was about as far as from here to that door, I reckon, from where I am at.

Q. You could tell it was Marshal Tucker that distance?

A. Yes, sir.

169 Q. See without any trouble at all?

A. Yes, sir.

Q. Was the moon shining?

A. No, sir; a bright starlight night.

Q. Could you tell Wilson?

A. Yes, sir.

Q. How was he dressed?

A. I don't know how he was dressed. It was dark enough. I could not tell how he was dressed, but I could tell who they were.

Q. Did you see a pistol in either one of their hands?

A. Yes, sir.

Q. Whose hand did you see the pistol?

A. I saw Mr. Wilson fire; it was in his hand first.

Q. You saw the pistol in Wilson's hand?

A. Yes, sir.

Q. What was Tucker doing at the door?

A. He kicked a time or two on the door and told them to open it up, or something of that kind.

Q. Knocked with his feet?

A. Yes, sir.

Q. What did they say from the inside?

A. I don't know what they said; I could not tell.

Q. You were not close enough to hear what they said?

A. I could not understand what the people was saying on the inside. I could hear the men that was on the outside.

Q. You say, now, that the shot was fired from Wilson?

A. Yes, sir.

Q. How far was Wilson standing from Tucker?

A. He was standing, I guess, eight or ten feet from Tucker.

Q. Just behind him?

A. Yes, sir.

Q. How far was he from the door, then?

A. I don't know just exactly how far he was from the door. He was pretty close to the door, though.

Q. Tucker was on the second step of the door, you say?
A. No, sir; on the first step of the door.
170 Q. And then Wilson shot?
A. Yes, sir.
Q. And immediately walked up and gave the pistol to Tucker?
A. Yes, sir.
Q. You saw him do that?
A. Yes, sir.
Q. Then Tucker took the pistol and shoved against the door a couple or three times?
A. Yes, sir.
Q. Struck the pistol against the door?
A. Yes, sir; punched it against the door.
Q. You didn't know anything had happened at that time?
A. No, sir; I didn't know there was any one hurt at all.
Q. What did you do after he struck the door with the pistol?
A. I walked away.
Q. You didn't think anybody was hurt?
A. No, sir.
Q. You had no idea that anybody was hurt?
A. No, sir; I didn't have any idea anybody was hurt. I didn't know but what he might commence shooting and hurt some one or might shoot me.
Q. You didn't hear anything?
A. No, sir.
Q. You didn't hear any holloing?
A. No, sir.
Q. Why did you think he was going to hurt you?
A. I didn't know but what he might; he was drinking.
Q. Who was going to hurt you?
A. Tucker, after he handed Tucker the pistol.
Q. Tucker hadn't shot?
A. I know, but he had the pistol in his hand.
Q. How do you know that he had it?
A. Couldn't I see it?
Q. You could see it forty or fifty feet away?
A. Yes, sir.
Q. Did anybody open the door while you were there?
A. I reckon the door was opened after I started away. I looked back and I noticed that the door was open.
171 Q. Was there a light in there?
A. Yes, sir.
Q. You heard no excitement?
A. No, sir.
Q. Not a bit?
A. No, sir; only I heard Tucker and them talking yet, still, but I didn't know there was anybody hurt at the time.
Q. Was the door opened before you started away or afterwards?
A. After I started away.
Q. You looked back and saw it?
A. Yes, sir.
Q. You walked off, I suppose?

A. Yes, sir.

Q. You didn't run?

A. No, sir; I didn't run.

Q. How fast did you go? Did you go the regular old straight road to Old Town?

A. No, sir.

Q. What road did you go?

A. I struck a road down there—the road that went to the railroad, and I went straight across to the railroad and went to Old Town.

Q. You didn't hear a sound like anything had happened at all?

A. No, sir; I only heard the pistol, but I didn't know there was anybody hurt at that time.

Q. You heard them talking; you heard Tucker and who talking?

A. I heard Tucker; I didn't hear anybody else talking to him; I heard somebody else, too, but I don't know who it was.

Q. A man or a woman?

A. I don't know whether it was a man or a woman.

Q. Can't you tell a woman's voice?

A. I could not because I was not noticing it. I noticed Tucker's voice; I knew his voice and I heard him.

Q. But you turned around and you said you still heard them talking; was it a man and a woman talking or two men?

172 A. I could not tell you; I heard them talking, but I could not tell you who it was.

Q. Could you tell whether it was a man or a woman?

A. I knew that Tucker was a man, of course, but I didn't know who the other one was.

Q. You didn't know who the other one was?

A. No, sir.

Q. Don't you know whether it was a woman or a man?

A. No, sir.

Q. My friend, do you pretend to say you could not hear two people talking so you could tell whether one of them was a woman or not?

A. No, sir; I could not.

Q. How does that happen, that you could not tell whether it was a man or woman, or two men?

A. I could not tell, or anybody else could not, without you could see and tell who it was.

Q. If you heard two persons talking out there in the hall, could you not tell whether they are men or women talking?

A. No, sir.

Q. You could not?

A. Sometimes I might and sometimes I might not.

Q. You were not very badly frightened, were you?

A. No, sir.

Q. You were not scared, were you?

A. I was a little scared, but none to amount to anything.

Q. Why were you scared?

A. Because.

Q. Hadn't you heard lots of pistols fire?

A. Yes, sir.

Q. You had shot lots of them yourself?
A. Yes, sir.
Q. You had been arrested at that time for carrying concealed weapons?
A. No, sir: I wasn't arrested at that time.
Q. What kind of a case was it you went to see your lawyers on?
A. About the pistol case.
173 Q. You had been arrested?
A. Yes, sir; I had been arrested before that.
Q. You said you had not been arrested; you just this minute told me under oath you had not been arrested at that time for carrying a pistol.
A. I hadn't; at that time.
Q. Well, my conscience alive, you just then said you had been arrested a minute before.
A. No; I never.
Q. Had you, or had you not, been arrested at that time for carrying a pistol?
A. I wasn't arrested at that time.
Q. What did you go to see your lawyers for?
A. Because I wanted to see about my case.
Q. You hadn't been arrested, and you didn't know you would have any case?
A. Yes, sir; I had been arrested before that, but I was not under arrest at that time.
Q. You are a bright one. You can not tell a man's voice from a woman's, and you could not tell whether you had been arrested at that time or not. I asked you if you had been arrested at that time or not, and you said no.
A. I was arrested before that, of course——
Q. I didn't ask you if you were under arrest*p*; I asked you if you had been arrested before that?
A. Of course I had.
Q. Then you were not very much afraid of a pistol, were you?
A. I was right smart afraid.
Q. You had carried them contrary to law?
A. I had carried one a time or two.
Q. What for?
A. Same as any other boy, I guess; to show out a little.
Q. You wanted to show out, did you. If you were so used to a
174 pistol, do you mean to tell this jury that when the pistol fired you turned your tail and skulked away because you heard the pistol fired?
A. I hadn't only heard it; I seed it; I seed the flash of the pistol.
Q. And then that frightened you. You knew Marshal Tucker?
A. I knew him when I seed him.
Q. He was a friend of yours?
A. No, sir.
Q. He was not an enemy?
A. No, sir; he wasn't any enemy, and I don't know that he was any particular friend.
Q. Why did you think he would hurt you with the pistol?

A. I knew he was drinking, and he was as liable to shoot one was as another.

Q. Why?

A. Because any drunken man is just as liable to shoot one was as another when they get a pistol in their hands.

Q. What made you think he would do that?

A. I do not know; I didn't know whether he would shoot or not, but I had no business there.

Q. You had been around where pistols were shot very frequently—where drunken men had pistols—hadn't you?

A. No, sir; not many times, I hadn't.

Q. Did anybody on earth see you start to that place?

A. I don't know as they did.

Q. Did anybody on earth ever see you about that place at that time?

A. No, sir; there was not that I know of.

Q. You saw nothing of these two women, Fannie Orwick and Lillie Ibison, that are here, who were there that night?

A. No, sir.

Q. You didn't hear them yelling and screaming?

A. No sir.

Q. You didn't hear a sound uttered from them up there about the house while Tucker was talking and this was going on up there?

175 A. Well, Tucker was talking right smartly and I wasn't paying any attention to what was going on.

Q. Was Tucker talking, you say?

A. Yes, sir.

Q. What was he saying?

A. I don't know what he was saying.

Q. What was he saying when he was standing there at the door?

A. He was standing there telling them to open the door up.

Q. You heard that?

A. Yes, sir.

Q. Did he say if they did not open it up he would open it for them?

A. I never heard him say that.

Q. You forgot these things?

A. No, sir; I didn't forget them; I don't forget what I know.

Q. Why did you go away from there?

A. Because I didn't have any business there with a drunken man with a pistol in his hands.

Q. You could not tell that he was drunk?

A. Why couldn't I?

Q. How?

A. I can tell when a man is drunk by his voice and actions.

Q. In the night 40 or 50 feet away; you could tell by his voice; you could tell whether a man is drunk who you had just seen a few times, and that you saw then talking 40 or 50 feet away from you; you could tell whether he was drunk or not?

A. Of course I could.

Q. How could you tell?

A. I could tell by his voice.

Q. How does a drunken man talk?

A. He will talk most any way.

Q. Give us some little idea what peculiarity there is about a drunken man that causes you to know that Marshal Tucker was drinking; when he says "Open up" how did he say it?

A. He just told them to open up.

Q. What kind of a voice; was it clear cut or did he talk away down in his stomach?

176 A. He just talked the common way; he just said, "Open up the door."

Q. He just said that like any other man would say to open up the door?

A. Yes, sir.

Q. If he said it like any other man would say it what makes you think he was drunk?

A. I could tell by his voice.

Q. You said he said it like any other man?

A. I said any other drunken man.

Q. You said any other man.

A. You knew what I meant.

Q. No; I didn't know what you meant. You told me he talked just like any other man. You knew they were drinking, and you had to get away from there?

A. Yes, sir.

Q. You walked in an ordinary gate, did you?

A. Yes, sir.

Q. What time did you get to Old McAlester?

A. I don't know what time it was; I never——

Q. Where did you stay at Old McAlester that night?

A. I do not know the man's name I staid with.

Q. What did you go to Old McAlester for?

A. I just went over there to be knocking around.

Q. Why didn't you go back to South Town?

A. Because I did not want to go back.

Q. Who did you want to see at Old McAlester?

A. No one.

Q. Did you start to Old McAlester?

A. No, sir.

Q. After this shooting why did you conceive the idea of going to Old McAlester?

A. I just wanted to go over there.

Q. What made you change your mind and go to Old McAlester if you did not think of it before the shooting?

A. I just wanted to go over there to see if I could see anybody that I knew.

Q. What did you want to do it for?

A. I have told you what I wanted to do it for.

177 Q. Were you walking around over the country trying to find some one that would recognize you and associate with you?

A. No, sir.

Q. Then why did you go to Old McAlester?

A. Just because I wanted to go.

Q. Who did you expect to see over there?

A. I don't know; I wasn't expecting to see anyone.
Q. How long since you had been at Old McAlester?
A. I had not been there but once before that at all.
Q. You never had been at Old McAlester but once before that?
A. No, sir.
Q. You had been there once before?
A. Yes, sir.
Q. How long before that?
A. It was the time I was carried to Muskogee, about a month before that.
Q. You just passed through there?
A. No, sir; I went there and stopped and waited for the train.
Q. How long did you stay there?
A. I staid there a couple of hours, I suppose.
Q. That is the only time you have been in Old McAlester?
A. Yes, sir; before.
Q. Your boarding place was at South McAlester?
A. Yes, sir.
Q. What time of night was this?
A. I don't know exactly what time of night it was; somewheres between 8 and 9 o'clock, I reckon.
Q. You had never been at Old McAlester but once?
A. That is all.
Q. You staid there two hours that time?
A. Yes, sir.
Q. Under arrest; didn't make any new acquaintances, did you?
A. No, sir.
Q. You didn't know anybody in Old McAlester?
A. No, sir.
178 Q. Where did you stop when you got over to Old McAlester?
A. I stopped at a restaurant there when I got there.
Q. Did you sleep on the floor?
A. No, sir.
Q. Where did you sleep?
A. Upstairs.
Q. Whose place?
A. I don't know who he was.
Q. Close to the depot?
A. Yes, sir.
Q. How far from the depot?
A. I don't know exactly; it was 50 or 75 yards, I reckon.
Q. You staid there all night at Old McAlester?
A. Yes, sir.
Q. Now, you say you went down to Old McAlester and staid all night?
A. Yes, sir.
Q. How much did you pay for your lodgings that night?
A. I paid fifty cents.
Q. Did you go to bed as soon as you got there?
A. No, sir.
Q. Where did you go?
A. I went to the depot and looked around there awhile.

Q. What were you looking at?
A. I wasn't looking for anything. I was seeing if there was anybody there I knew.
Q. They would not recognize you in South McAlester, I reckon; you could not find anybody to associate with you?
A. There was nobody there was really acquainted with.
Q. You didn't find anybody at the other town you were acquainted with; you had no idea you would find anybody there, did you?
A. I thought maybe I might.
Q. You were just rambling around trying to find somebody you knew?
A. No, sir; I was just knocking around; I didn't have anything else to do.
Q. You staid at Old McAlester all that night?
A. Yes, sir.
Q. You went to the depot; how long did you look around there?
179 I don't know how long; it wasn't but a few minutes. I don't know just exactly.
Q. You went up and asked a man to give you a bed?
A. Yes, sir.
Q. You didn't know the man's name?
A. No, sir.
Q. What kind of a looking man was he; was he a little heav'-set fellow, or a tall, slim, gaunt, red-haired man?
A. He was just a man; that is all I can tell you.
Q. Did you ever see him before?
A. No, sir.
Q. Have you ever seen him since?
A. Yes, sir.
Q. Where?
A. I seen him there.
Q. When did you go back there?
A. I ain't been back there; when I seed him I saw him at New Town.
Q. When did you go back to South Town?
A. I went back the next day after I staid with him all night.
Q. What time the next day?
A. Betwixt 10 and 11 o'clock, I reckon; somewheres along about that time.
Q. How did you go back?
A. I walked back.
Q. Where did you hear of the killing?
A. I heard of it there at South Town.
Q. Who told you about it?
A. I don't know who it was; I just heard some men talking.
Q. Did you tell them you were up there and saw that?
A. No, sir.
Q. Why?
A. Because I didn't want to.
Q. Who did you talk to there in McAlester that day?
A. I talked with a lawyer there.
Q. Who?
A. His name is Wallace.

180 Q. Who else did you talk to?

A. I don't know; I wasn't acquainted with anybody else. I talked w'th several people there; of course, I didn't know them.

Q. You did not talk with anybody who is here, did you?

A. No, sir.

Q. Is there anybody here who saw you about McAlester at that time?

A. I guess there is.

Q. Who?

A. I don't know who it is, but I was knocking around there and they could have seen me, like I would see you if you were knocking around anywhere.

Q. I hope you never will——

A. And of course I don't know who will ever see me.

Q. I never want to get in the same neck of the woods you are, if I can help it. Now, you say that after the shooting, after Wilson shot, he walked up and gave Tucker the pistol, and then Tucker took the pistol and pounded the door with it?

A. Yes, sir.

Q. Two or three times after the shooting?

A. Y's, sir.

Q. Tucker was standing on the first step at the time the shooting took place?

A. Yes, sir; standing on the first step.

Q. Tucker was talking rapid and cross, was he?

A. Yes, sir.

Q. You could tell it was Wilson that done the firing?

A. Yes, sir.

Q. You could see him?

A. Yes, sir.

Q. How many times had you seen him before that?

A. I don't know how many times I had seen him; several times.

Q. You could see him; was the pistol in his hand?

A. Yes, sir.

Q. Saw him draw it right up and shoot?

A. Yes, sir.

181 Q. Which way did he shoot?

A. He shot towards the door.

Q. How long did you board at Pat's?

A. I boarded there four or five or 6 days; I don't remember how long.

Q. Where did he keep there in South McAlester?

A. He kept down next to the—tolerable close to the platform of the M., K. & T. Road.

Q. Had you boarded at Wilson's any time you were there?

A. Yes, sir.

Q. Didn't you board at Wilson's, and leave Wilson's and leave town before the shooting took place?

A. No, sir; I did not.

Q. You left Wilson's boarding house before the shooting took place?

A. Yes, sir.

Q. How many times did Tucker kick against the door?

A. He kicked it two or three times.

Q. He kicked it before any shooting was done?
A. Yes, sir.

Redirect examination by Mr. W. M. CRAVENS:

You went on over to Old Town, McAlester?
A. Yes, sir; that was about the same distance from there.
Q. That was about the same distance as it was back to New Town?
A. Yes, sir.
Q. That is about halfway between?
A. Yes, sir.
Q. It is pretty much a continuous town all the way, is it not? Houses scattered along pretty thick from one town to the other, are there not?
A. Yes, sir.
(Witness excused.)

182 MARSHAL TUCKER, the defendant, having been duly sworn in his own behalf, was examined by his counsel, Mr. William M. Cravens, and testified as follows, to wit:

Question. Where do you live?
Answer. I live in the Choctaw Nation.
Q. At what plac'—near what place?
A. Near Poteau Switch, about fo'r miles east of Poteau.
Q. Who do you live with?
A. Ed Taylor.
Q. That is your father?
A. Yes, sir.
Q. You are charged with killing this woman, Lulu Mays.
A. Yes, sir.
Q. I want you to go ahead and tell the jury all you know about it; where you were, and all about it. Were you in McAlester that night?
A. Yes, sir.
Q. When did you go up there to McAlester?
A. I went up there on the Choctaw train. It arrives in McAlester, I think, about 7 o'clock—soon about that time.
Q. You arrived there that night?
A. Yes, sir.
Q. You got there on the arrival of the Choctaw train, you think about 7 o'clock that night?
A. Yes, sir.
Q. Where from?
A. From Jenson; started from Jenson. I left my horse at Cameron and went down to Jenson and met so'e boys.
Q. How came you to go to McAlester?
A. Will Neal subpœnaed me as a witness. He arrested a man on the train, and he held me on the train for a witness and taken me on to South McAlester.
Q. That is the reason you went?
A. Yes, sir.

Q. Were you a posse riding with anybody at that time?
183 A. I was working with John McMurtry; yes, sir.
Q. This court, or that court up there?

A. The McAlester court.

Q. Were you drinking that day or that night?

A. Yes, sir; I was drinking.

Q. I would like to *het* you to tell the jury about your going to this house, and all about it; everything in reference to this killing?

A. When I got to McAlester that night on the train I went over to Mr. Wilson's and taken supper.

Q. I want to ask you where you first met with William Wilson?

A. At the depot. He was down there for *for* the purpose to show parties to the house.

Q. You met with him at the depot, and you went to the house with him?

A. Yes, sir; right straight to the house with him.

Q. Go on now, and tell from that on.

A. I went up there and taken supper, and after supper Willie was standing out in the yard, and I walked out and got a drink, and he says, "Suppose we walk up in town?" and I told him all right. There was several boys I was acquainted with out there, and I would go up and knock around awhile. We went up there in town, and stepped into a little restaurant, or place—before we stepped into that place we went to Billy Wilson's billiard hall, where they had some cider, and Billy said they had some good cider in there, and we went in there and called for drinks, and we taken a drink or two, and he also asked them for a quart bottle or two, and he got it.

Q. You took a drink or two, and he asked in addition to that for a quart of this hard cider?

A. Yes, sir. And we stepped right across the street from there
184 to another little place, and I walked in to get a cigar, or light a cigar, I don't know which. While I was in ther' 'e was on the outside talking t' a couple of men. I don't know who they were; he told me he didn't know who they were. I staid in there while he was out there talking to them, and finally he hollered to me, and he said, "Come on, Marshal," and I stepped on out there, and then the other two fellows left, disappeared, and he says, "Suppose we go over on Chippy Hill for a little fun?" We were walking on down towards the house, and I said, "I don't care; I would just as soon go as not," and I says, "You are acquainted with the road; strike out and lead the way," and he went a path, started up a pathway, and I don't know 'ow we did go. I don't know as I could go it to-day. I don't know which road we went, or nothing about it. I know it was a terrible rough way. We started over there, and I fell down some three or four times over the rocks; I don't know how many times. One time I sprained my ankle very bad. Finally, when we got to this house, we come up on the east side of the house; there was a window in that side of the house, and there was a light burning in there, an' a red blind; I remember it looked kind of red, and he said, "There is some pretty good girls in there," or something to that amount, and I said, "We will go in and see them," and I passed him at the corner of the house, and he stood right there, and I walked at the step, and I said, "Hello, girls," or something of the kind, and they says, "Who is that?" and I said, "A friend," or something that way. They says, "Who is a friend," and I said, "Marshal Tucker," and about the time I said

"Marshal Tucker," or something of that kind, there was a shot fired, and I jumped sort of to one side off the step; I didn't know which
185 way the shot came from, from the inside or outside. I jumped back to my left that way, and Billy Wilson shoved the pistol to me, and said, "Here, take that." I didn't know he had the pistol until then. I didn't know mine was gone or nothing abo't it.

Q. It was your pistol, was it?

A. Yes, sir.

Q. He shoved it to you, and said "Here, take this"?

A. Yes, sir.

Q. That was just after the shot was fired?

A. Yes, sir; I did not know who fired it, or anything about it. I didn't know whether it came from the inside or out. And then the door flew open, and these girls ran out, and they says, "Law, Marshal, you have killed Lou," and I said, "I have done nothing of the kind," and one of them went up and began shaking hands, and I said, "Don't run to me and accuse me of doing anything of that kind; I have done nothing of the kind." And they took the road towards Old Town, and me and Wilson turned and leaves the house and goes on back. After we got over there in South Town, Wilson turned up the road and said, "I am going up in town; you can go on and go to bed when you get ready," and I says, "I will go to bed; I am sleepy," and I got down to the house, and Miss Belle Wilson was in the room, and she says, "You sleep with Willie Neal." I says, "Very well," and I pulled my pistol out of my scabbard, and said, "Lay this away until morning." I says to them, "I saw a little trouble happen over here to-night, and me and Billy and me may be accused of it, and I hope not."

Q. You said you and Billy might be accused of it?

A. Yes, sir; I said we may be accused of it; I hope not. And Bill Neal when he heard that he says, "I am going up town to see something about it, and he went up in town, and I says, "I don't know as it
186 makes any difference," and he goes up and comes back, and he says, "You are accused of the killing," and I says, "Is that so?" and he says, "Yes," and I said, "I will go right straight, if I am accused of it, and give up to a Fort Smith marshal," and I asked him if there was a Fort Smith marshal here, and he says, "I do not know; Jack Ellis used to work for the court as an officer." I says, "I will go and give up to Jack." I went right straight off to Jack Ellis's house and called him out, and I says, "I am accused of this killing, and I want to give myself up, and I can prove myself clear, and he said, "Very well; my lady is sick now, and he said for me to go up to Mr. Killpatrick's, up to his hotel, and lay down to morning, and I went up there and laid down, and when I woke up Wilburton and Mr. Shellburn and McKay and another Indian was setting in the room guarding me, I suppose. The' searched me and carried me down to the little jail by the court-house and put me in that, and kept me there all night, and taken me out the next morning for breakfast, and kept me there all day Sunday, and Monday they brought me here.

Q. What day of the month was the killing?

A. On the 15th of October, on the night of the 15th—Saturday night.

Q. It was not in September?

A. No, sir; it was not in September at all.

Q. Did you fire any shot up there at all?

A. No, sir; I did not fire any shot at all. I never had my hand on the pistol until I put it back in my scabbard.

Q. It was handed to you after the shot was fired?

A. Yes, sir.

Q. He went and poked it to you, and said, "Here, take this"?

A. Yes, sir.

187 Q. And you say you didn't know then whether the shot was fired from the inside of the house or not?

A. No, sir.

Q. You didn't see the flash of the pistol?

A. No, sir.

Q. You just heard the report?

A. Yes, sir.

Q. You were then standing close to the door?

A. Yes, sir; as wel' as I remember one of my feet was on the bottom of the doorstep.

Q. Do you remember after the shot was fired still knocking on the door and telling them to open it?

A. No, sir; I do not.

Q. You do not remember that?

A. No, sir.

Q. Did you start to go to McAlester or was there any suggestion about going to McAlester or where did yo' start to go to?

A. The truth of the business, we started to Chippy Hill, and that was proposed by Mr. Wilson. He proposed going there, and there is where we went.

Q. When did you hear any suggestion about going to Old Town?

A. After we got down to jail Wilie Wilson told me to tel' we were going to Old Town. He didn't want his dad to know that he wanted to go over there that night at all. He says, "I don't want him to know it," and I never gave him any answer about it at all; that is, after we got in jail, and that is the most that we have talked about the thing at all. He says, "We must tell we started to Old Town," and I never gave him any answer whether I would or not. But that was not the truth of the thing at all.

Q. You did not start to Old Town at all?

A. No, sir.

Q. Do you know whether your pistol was shot that night? Did you examine it afterwards?

A. I don't know.

Q. When you went back to the house you gave it to the young

188 lady, and you have not seen it since?

A. No, sir; I have never seen it since.

Q. You don't know what condition it was in?

A. No, sir.

Q. It was Miss Belle Wilson you gave it to?

A. Yes, sir.

Q. You don't know whether it was fired that night or not?

A. No, sir; I do not.

Q. Miss Belle is a sister of William Wilson, is she not?

A. Yes, sir.

Q. Did you tell Belle Wilson or Tenie Wilson or any of them that you had shot the woman?

A. No, sir; I did not.

Q. What did you tell them?

A. I told them there was a woman killed over there and I suppose—I didn't know that even, only what the talk came in in town, and I says, "I am accused of it, me and Billy"—I says, "Me and Billy may be accused of it," but, I says, "I am not guilty."

Q. You told them you didn't do it?

A. I told them I didn't do it. I says, "I am not guilty. I don't know who done it."

Q. Did you talk about leaving or make any efforts to leave that night?

A. No, sir; I turned my pistol over to them, and they told me I would sleep in the room with Willie Neal.

Q. Where was Neal?

A. In bed.

Q. After you talked about the woman being killed he went up to investigate it?

A. Yes, sir; and I went and laid down in the same bed while he was gone. I was laying down when he came back.

Q. Did you undress?

A. Yes, sir; I undressed. I went to bed in the same bed he got up out of.

Q. You got in his bed?

A. Yes, sir; in the bed he got out of.

Q. When he came back and he said you were accused of it, you said you would go and surrender to the proper authorities, and asked him who was the Fort Smith marshal?

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A. Yes, sir; and he said Lindley would do, and I told him no; he hadn't no right to take charge of me; and he said, "Jack Ellis works for that court sometimes," and I says, "I will go up to Jack Ellis's," and I did so. I went right straight to Jack Ellis's.

Q. You went out without your pistol?

A. Yes, sir. I never even asked for it.

Q. You went up and surrendered to Jack Ellis?

A. Yes, sir.

Q. Who was it Jack turned you over to?

A. Killpatrick.

Q. Was he an officer?

A. He was an officer of some kind or another, working under someone else or something of the kind, and Jack says, "I will turn you over to Killpatrick until morning, and he told me to go up to his hotel.

Q. And he took you up there and put you to bed?

A. Yes, sir.

Q. And the first you knew of these other officers you 'waken' up in the morning and they were standing around?

A. Yes, sir. Wilburton is the man, I believe, that brought me down here, and another fellow, an Indian police.

Q. You had been asleep, had you?

A. Yes, sir.

Q. Were you intoxicated that night?

A. Yes, sir; I was intoxicated.

Q. After getting your supper you went up and drank some cider—how much did you drink?

A. I could not tell you how much I drank; I drank right smart there before I left the bar.

Q. What was done with the bottle Wilson bought there?

A. I remember of drinking several times after we left, going over that hill. The bottle was finally thrown down, and if there was any
190 left in it I don't know.

Q. When the shot was fired you stepped back and Wilson handed you the pistol. Did you go back in the house to look in to see whether the woman was dead or not?

A. No, sir; I just stood right there at the same place. I was nearly right in front of the door then.

Q. Did you see the woman?

A. I just seen it looked like a part of skirts or feet or something laying in the edge of the door. I never went to see anything about it at all; when these women ran out and said I had killed Lou I told them it was a mistake; that I hadn't done any such a thing. I said I haven't done any such a thing.

Q. Did you tell these Wilson girls that you had not done it?

A. No, sir; I did not.

Q. That you 'ad not killed the woman?

A. No, sir; I never told them anything of the kind at all. I didn't speak about killing any woman at all.

Q. Did you tell them you had done it?

A. No, sir.

Q. And not to give you away?

A. A. I never had any such talk about it at all.

Q. Did you know this woman, Lulu Mays?

A. Yes, sir; I had seen her before some two or three times.

Q. Had you any unfriendly feeling towards her, any trouble with her?

A. I never had any trouble with any one of them.

Q. At the time you heard the shooting, at the time the shot was fired, did you know there was anybody at the door at all?

A. I didn't know there was anyone at the door at all. The voice that answered me seemed to be in the back part of the house. I
191 didn't know there was anybody standing at the door at that time at all.

Q. You have been in jail since that time?

A. Yes, sir.

Q. That was on the 15th of October; when were you brought down here?

A. I was put in jail on the 17th; on Monday.

Q. Wilson was put in jail, too, was he?

A. Yes, sir.

Cross-examination by the ASSISTANT DISTRICT ATTORNEY:

Q. You have detailed the circumstances that took place there at the shooting that night pretty clearly; you remember what you have stated as having occurred that night, do you?

A. Yes, sir.

Q. Then you were not so very drunk?

A. Oh, no, I wasn't drunk; I was drinking; drinking right smart.

Q. You were not drunk?

A. No, sir; I could walk and go all right. Once in awhile I would stumble a little on the rough road.

Q. You were sober enough to know what you were doing?

A. Yes, sir.

Q. Well, now, when did you find out you were sober enough to know what you were doing?

A. I knew that all the time.

Q. You filed an application for witnesses here, didn't you?

A. Other parties said the' seen me drinking that night.

Q. (Reading.) "By the other witness named, who reside' at South McAlester, defendant can shot that he was so intoxicated at the time of the alleged homicide that he did not have any knowledge of what he was doing, and was incapable of forming any design."

That purports to have been signed by you, M. N. Tucker, and
192 sworn to the 20th day of February, 1893.

Mr. CRAVENS (of counsel for defense). That is what he said he could show by this witness.

The ASSISTANT DISTRICT ATTORNEY. He swears this statement he believes to be true, and that he is not possessed of sufficient means, and is actually unable to procure the attendance of the said witnesses. This is y'ur signature, is it not?

A. I remember that paper.

Q. That is your signature?

A. Yes, sir; that is it.

Q. It seems, since the 20th of February, last month, not 30 days ago, you have changed your mind about whether you knew what was going on there or not?

A. No, sir; my mind has not be'n changed on this at all.

Q. When you swore to that you said you didn't know what you were doing, and had no mind at all?

A. There was no such question as that asked me at all.

Q. This application was read to you before you swore to it, was it not; or you read it, one?

A. These witnesses were about, seeing me intoxicated that night, and I said, "Yes, I seen these parties."

Q. Your defense was going to be, then, you were so drunk you didn't know what you were doing; you were going t' get out of it on the ground you were crazy; that was the defense, then, was it not?

A. No, sir; it was not that I was crazy.

Q. This looks very much like it.

A. It wasn't that way at all.

Q. The defense, then, was surely that you might have done it, but if you did you were crazy drunk, and so much so you didn't
193 know it. This paper has got your signature to it, and you are an intelligent man. (Reading.) "By the three witnesses first named," and they are Pink Hooper, Crockett Lee, and Walter Hughes; they are the three, are they not?

Q. There are these witnesses, named and set out in this application: Pink Hooper, Crockett Lee, Walter Hughes, and George Stephens. Then this application reads like this: "By the three witness' first named, who reside at South McAlester, he can show that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing, and was incapable of forming any design."

A. I never saw George Stephens that day at all.

Q. That is what you swore when you made your application for witnesses. You were pretty drunk that day, were you not?

A. Yes, sir; that is the truth about it.

Q. Coming from Jenson?

A. Yes, sir.

Q. You were making them hide out on the train, were you not?

A. No, sir; I wasn't.

Q. What?

A. No.

Q. Do you swear you were not?

A. Yes, sir.

Q. Don't you know that this man Neal, who has been subpœnaed here as a Government witness, had to disarm you?

A. No, sir.

Q. This man Neal, who has run off because you were ma'ing the people leave the car, and he 'ad to disarm you?

A. Will Neal never touched my pistil, and never disarmed me.

Q. Do you say you did not have to be disarmed, going down on the train?

A. Yes, sir.

Q. On the Choctaw road?

A. Yes, sir; I say that.

194 Q. Neal was with you?

A. Yes, sir; he was with me.

Q. He is not here now?

A. I don't know where he is now.

Q. You deny that?

A Yes, sir.

Q. You think, now, you know everything that took place?

A. I didn't say I knew everything?

Q. Why didn't you set up in your application that another man fired the shot, and you didn't fire it, instead of setting up the defense you were beastly intoxicated, and didn't know what occurre'?

A. I have never said that Wilson fired a shot. I say I don't know who fired the shot.

Q. Instead of setting up the fact that you were intoxicated, so you didn't know anything about what occurred, why didn't you set up the fact you didn't know who did the shooting, but you did not do it; you were ther' and heard the shooting, but didn't know who did it?

A. That is what I say.

Q. Were you under arrest at the time this killing occurred?

A. No, sir.

Q. Had you been under arrest?

A. Yes, sir.

Q. What for?

A. I had a fight with a fellow at Poteau.

Q. How much had you been sentenced to?

A. I got six months and $500.00. If the case is plead the judge will give me a new trial.

Q. That was in the McAlester court?

A. Yes, sir.

Q. How long was that before that?

Mr. CRAVENS (counsel for defendant). I do not think that is competent for the district attorney to show that. He can not attack his character by showing conviction of that kind. I know that he is on
195 the stand as a witness, but I do not think that impeaches his character. I do not think that is good testimony.

The COURT. I think he can shot his history, what he has been doing. (Defendant excepts.)

The ASSISTANT DISTRICT ATTORNEY. He has a right to state all the facts in connection with it, but I have right to show that he was charged with a crime and convicted. Was it the judge or the jury that gave you the fine?

A. The judge gave me the fine.

Q. The judge sentenced you to six months in jail?

A. Yes, sir.

Q. Have you ever been tried any more for it?

A. No, sir.

Q. This killing occurred after you had been released on bond?

A. Yes, sir.

Q. And the case was pending at that time?

A. Well, it had to go before the grand jury; it never went before the grand jury yet, and it has went before the grand jury, and they have found a bill against me since I have been here.

Q. Now, you say you went up to the door and was knocking?

A. I hollered "Hello."

Q. And you had that conversation that took place there?

A. Yes, sir.

Q. And then the shot was fired, and Wilson came up and handed you the pistol?

A. The pistol was handed to me from behind.

Q. Then the door was thrown open?

A. Yes, sir; in a short time afterwards.

Q. And the women came out hollering.

A. Yes, sir; I was the first one to be seen.

Q. What did they hollo', just yelling and screaming?

A. No, sir; they ran out; when they first seen me; they said,
196 "Law, Marshal, you have killed Lou."

Q. In a loud voice?

A. No, sir; not very loud; tolerable loud, too. They didn't hollo' out; I didn't hear any hollo'ing.

Q. They didn't seem excited?

A. Yes, sir; they were excited.

Q. Both of them, I suppose, talking?

A. Yes, sir; both of them talking. They says, "You have killed Lou."

Q. "Don't shoot any more; you have killed Lou?"

A. They didn't say anything about shooting; they said, "You have killed Lou."

Q. You had the pistol in your hand at that time, did you?

A. Yes, sir; I had the pistol in my hand.

Q. What did you do with the pistol?

A. The pistol was handed me before the door flew open.

Q. What were you doing with it in your hand?

A. I was putting it back in the scabbard. I did put it back. The scabbard was sticking back in my hip pocket, back that way; it was a long pistol, a long scabbard.

Q. You were putting it back in?

A. Yes, sir.

Q. How long did it take you to get it back in?

A. I don't know how long it was, not long.

Q. Then you were not much drunk, were you?

A. No, sir.

Q. Not so drunk but what you knew what you were doing?

A. No, sir.

Q. You knew everything that was go'ng on?

A. Yes, sir.

Q. You had been around this house before that?

A. Yes, sir; I had been around there in the daytime.

Q. You had been around there more than Wilson had?

A. No, sir; I don't suppose I had been there as much as he had.

197 I had gone there with a fellow named Lee one night, me and him went there, he was a deputy marshal, and he says, "I suppose there selling so'et'ing over there that is intoxicating," and asked me to go with him. We never went in the house at all. We went up to the door and there was a big crowd of fellows in there drinking, and he went in and tasted of it, and said he didn't think it was intoxicating.

Q. When you saw Fannie down at Krebs was it an official visit you were making at that time?

A. I went over there on some business. I have an uncle living at Krebbs, and I went to see him, and Billy Wilson was with me, and we went up to that house where they had some Choctaw beer.

Q. Where was that?

A. Over there at Krebbs.

Q. How old are you?

A. 30 years old.

Q. How old is Wilson?

A. I don't know.

Q. He is a good deal younger than you?

A. Yes, sir; I take him to be younger than I am.

Q. How much had you been stopping over at South McAlester.

A. I had been there during the September term of court, boarding there at Wilson's.

Q. During al' t'e month of September?

A. It wasn't al' the month.

Q. About all the month?
A. Yes, sir.
(Witness excused.)

Here court took a recess until 1:30 p. m.

198 AFTERNOON SESSION—2:00 o'clock.

EARL MATTISON, having been duly sworn upon behalf of the defense, was examined by Mr. Wm. M. Cravens, and testified as follows, to wit:

Question. Your name is Earl Mattison?
Answer. Yes, sir.
Q. Where do you live?
A. I live down on 3rd street.
Q. You live in Fort Smith?
A. Yes, sir.
Q. How long have you lived there?
A. About 9 or 10 years; about 9 years, I guess.
Q. Do you know this girl here, called Lillie Ibison, a witness in the case?
A. I have seen her since I have been around the court-house here.
Q. Did you have any conversation with her out in the hall here with reference to the case of Marshal Tucker?
A. I have talked to her two or three different times about it—that is, she has spoken to me several times about the case.
Q. Can you tell what was said?
A. The first time I was talking to her out here I asked her the case she was on, and she told me she was on the Marshal Tucker case, and I said, What do you think they will do with Marshal?" and she says, "I don't know." She says, "If my testimony will do any good, they will stick him."
Q. If her testimony will do any good they will stick him?
A. Yes, sir.
Q. Tell all she said.

A. I didn't have such conversation with her. About that time
199 Andy Hendricks came up, and she was still talking about the case, and Andy said, "If I was you I would not be any harder on him than I had to," and she says, "I will swear anything to stick him." That is about all the conversation I had with her.
Q. Did she say anything else?
A. No, sir; that is about all I can think of about the case.

Cross-examination:

The ASSISTANT DISTRICT ATTORNEY. Andy said, "If I was you I would not be too hard on him"?
A. He said, "I would not be any harder on him than I had to," or something to that effect.
Mr. CRAVENS (of counsel for defense). Were you acquainted with Marshal Tucker?
A. No, sir; I never saw him.
Q. You are not related to him?
A. No, sir.

The ASSISTANT DISTRICT ATTORNEY. Then it seems that you and Andy Hendricks were interesting yourselves in the case some way?

A. No, sir; I didn't know what case she was on.

Q. Now, who got you to do this?

A. No one at all.

Q. I will ask you if old man Tucker didn't get you to go to her and pump her?

A. I never saw him to know him until yesterday.

Q. Or some of his crowd; I will ask you if that is not the way it happened?

A. No, sir.

Q. Why did Andy come up and say, "I wouldn't be any harder on him than I had to?"

A. I don't know what his motive was, or anything about it. I was talking to her when he came up.

200 Q. You say that this man was unknown to you and Hendricks.

A. I don't know whether he was unknown to Hendricks or not.

Q. Why that declaration, "I would not be any harder on him than I had to?"

A. You will have to find that out from him.

Q. Are you around here in this court-house to pick up what witnesses say in order to become a witness here?

A. No, sir.

Q. Is that your business around here?

A. No, sir; I am working for Straus & Tilles.

Q. You make it your business to go to them and talk about the case, do you?

A. No, sir; that is the first time I was ever up here.

Q. How long have you been at work around the court-house here?

A. Three or four weeks.

Q. And you have got to be a witness in that time in this case by standing 'ut here and talking with the witnesses who are subpœnaed here in cases. Now, I suppose you paid particular attention to what she said to you on that point?

A. I am paid to stay here and talk to witnesses.

Q. Talk to them about cases, are you?

A. No, sir; not about the cases at all.

Q. What are you paid to stay here and do, then?

A. To come here and try to sell them some goods.

Q. You are a gouger for some store here in town?

A. Yes, sir; if you want to call it that.

Q. That is what I call it. You want to talk to the witnesses, and you put in a good deal of your time talking to Miss Lillie; you were particularly anxious to get her trade?

A. No, sir; not particularly anxious to get her trade. I found
201 out she had given Max Hopp an order, and I never tried to get her trade any more.

Q. You and Max Hopp stand in together, then?

A. No more than anyone else.

Q. You say you have been employed three weeks?

A. Yes, sir; about that time. I don't know just how long.

Q. When you first spoke to her she said if her testimony would do any good he would be stuck?

A. Yes, sir.

Q. And then Andy came up and said, "If I was you I would not be any harder on him than I had to?"

A. Yes, sir; he made some remark like that.

Q. Tried to get her not to swear against him, was he not?

A. I could not tell you what his motive was.

Q. What did you say when Andy said that?

A. I don't think I said anything.

Q. Haven't you been trying to get her to be light on Marshal?

A. No, sir, I haven't; I have not asked her to be light on him or anybody else.

Q. But Andy Hendricks did?

A. He must made that remark.

Q. You don't know what interest Andy Hendricks had in the case, do you?

A. No, sir; I do not.

Q. Then she said she would swear anything against him?

A. Yes, sir.

Q. You didn't expect to be a witness at that time, did you?

A. No, sir.

Q. But it made an indel/ible impression on your mind; that is just the language she used?

A. Yes, sir.

Q. You don't know Marshal Tucker?

A. No, sir; I never had seen him at that time.

202 Q. You talked to this witness, and you paid enough attention and was interested enough in the case to remember what was said?

A. No; I was not interested in the case at all. I ask all of them what case they are on as soon as I find out they are a witness, to find out if they have given an order to anyone.

Q. Are you paid to ask witnesses what will become of men they are witnesses against?

A. No, sir.

Q. You went outside of your duty when you asked her what she thought would become of Marshal Tucker?

A. Yes, sir; I expect so.

Redirect examination by Mr. WM. M. CRAVENS:

Q. Who were you employed by?

A. Straus & Tilles.

Q. To look after the witnesses here, solicit their patronage, and to see they paid their debts?

A. Yes, sir.

Q. You are clerking for Straus & Tilles?

A. Yes, sir.

Q. You are not a gouger?

A. He can call it that if he wants to; it is immaterial to me. I get paid for it.

(Witness excused.)

203 ANDY HENDRICKS, having been duly sworn upon behalf of the 'efense, was examined by Mr. William M. Cravens, and testified as follows, to wit:

Question. Your name is Andy Hendricks?

Answer. Yes, sir.

Q. Where do you live?

A. Fort Smith.

Q. What business are you engaged in?

A. Dry goods business.

Q. At what place?

A. Schram's, the Great Eastern.

Q. You are clerking for Schram, are you?

A. Yes, sir.

Q. Have you been about the court-house here during this term of court?

A. Yes, sir.

Q. Your business calls you up here, does it?

A. Yes, sir.

Q. For what?

A. Collecting from the witnesses.

Q. Have you seen this girl Lillie Ibison?

A. Yes, sir.

Q. I will ask you if you had a conversation with her—heard her make any statement out in the hall here in reference to Marshal Tucker?

A. Yes, sir.

Q. What was it she said?

A. She said she would do all she could to stick him.

Q. How come her to say that?

A. I don't know; they were talking about the case in a conversation and I overheard her say that.

Cross-examination:

The ASSISTANT DISTRICT ATTORNEY. Q. That was her language.

A. Yes, sir.

Q. She would do all she could to stick him?

204 A. Yes, sir; that is all I know about it.

Q. She would do all she could to stick him?

A. Yes, sir.

Qq. Didn't you go up and tell her if you were her you would not say anything more against him than she had to?

A. No, sir.

Q. Didn't you go up to her and tell her—speak up and say, "If I was you I would not do any more against him than I had to," or "I would not swear anything more against him than I had to?"

A. I told her I would be as light on the man as I could, I never like to kick a man when he was down, or something like that.

Q. Didn't you ask her to be as light as she could?

A. No, sir; I never said that.

Q. Didn't you go up to her before she made this remark you tell about and say, "If I were you I would not be any harder on him than I had to?"

A. No, sir; it was after the remark.
Q. What business was it of yours?
A. None of my business at all, sir.
Q. Have you got any interest in the case?
A. Not a bit.
Q. All she did say was she would do all she could against him to stick him?
A. Yes, sir.

Redirect examination by Mr. WM. M. CRAVENS:

Q. Do you know Marshal Tucker?
A. I have seen him a few times; I don't know him personally.
Q. You have no interest in the case?
A. No, sir; none whatever.
Q. He is not even a friend of yours?
A. No, sir.
205 Q. What is it you said to her?
A. She would do all she——
Q. What did you say to her?
A. They were talking, in a conversation; she and that other lady were together——
Q. What was it you said to her about being light on him?
A. I just said something similar; I didn't like to see a man stuck, or something of the kind.
The COURT. You state she was talking to the other lady; were you all sitting there talking? You said she was talking to another lady?
A. Yes, sir.
Q. What sort of a lady was it?
A. That witness.
Q. Tall lady?
A. Yes, sir.
Q. She was present and heard this conversation?
A. Yes, sir; she heard it.
The ASSISTANT DISTRICT ATTORNEY. Was Earl Mattison about?
A. Yes, sir; he was sitting there.
The COURT. What is your name?
A. Andy Hendricks.
Q. What is the name of this other young man who was just on the stand?
A. Earl Mattison.
(Witness excused.)

206 Mr. CRAVENS (counsel for defendant). I want to introduce the affidavit here before the commissioner to show that this offense w's committed on the 15th of October.
The COURT. That is secondary evidence.
The ASSISTANT DISTRICT ATTORNEY. I admit that.
Mr. CRAVENS (of counsel for defendant). You admit that it was on the 15th of October?
The ASSISTANT DISTRICT ATTORNEY. Yes; my witnesses made a mistake, two of them, and stated September.

Mr. CRAVENS (of counsel for defendant). Three of them.

The ASSISTANT DISTRICT ATTORNEY. I admit that it was the 15 of October.

207 Mr. CRAVENS (of counsel for defense). We want to offer the testimony, taken before the commissioner, of William Wilson and of this girl, Lillie Ibison.

The COURT. Very well.

The same was here read to the jury, and is as follows, to wit:

"Lillie Ibison, duly sworn, says: I reside at South McAlester. Know defendants. Knew Lulu Mays. Lulu is dead. She got shot on Saturday night about 15 min'tes after nine o'clock. Defendants came to door. Defendant Tucker came to door and said, 'Lou, open up.' She said, 'Is that you, Marshal?' He said, 'Yes,' and said 'Open up.' She said, 'I have company; I can't let you in.' He said, 'Open up.' She said, 'I have company; I can't do it.' He said, 'I will open up for you,' and then she called Fannie to door and asked her if she would open it, and Fannie said, 'Yes,' and before Fannie got to her she was shot on top of head. The shot was from out of doors. As Lulu hit the floor she said, 'O God, have mercy.' This was the last she said. Fannie opened the door after shot just the very minute she could get to the door, and Fannie ran out and then I came out right behind her. When Fannie ran out in yard she 'O', Marshal, do not shoot any more; you have killed Lou.' He walked to door and said, 'I have done it;' and she said, 'That's what you have.' He walked to her and said, 'Is that you, Fannie?' and she says, 'Yes'; and he said, 'Give me your hand,' and she gave him her hand and he shook hands with her, and I started up to him and he said, 'Do not come near me or I will shoot you, too.' He had pistol in his hand. I stopped and then we ran away and went to South McAlester to get Mr. Shellburn. We seen him and told him about
208 it, and then we went to Willie Bullard's and staid the rest of the night. Could not say where Wilson was standing when I went out. There was a pistol shoved against the door twice. When pistol was shoved against door he asked Lulu to open door. The door was locked. It was the front door. Defendant Tucker came to the do'r first. I knew his voice.

"Cross-examination: Do not know what was the reason Lulu would not let him in. There was but one shot fired. It was powder burn where bullet went in door. Door was not opened at all before shot fired. Fannie Orwig, myself, Lulu, and Fannie's little boy about 7 years old. I should think Tucker fired the shot; Tucker fired the shot.

"WILLIAM WILSON, being duly sworn in his own behalf, says: I and defendant Tucker was there. Tucker came on in the train that evening about 7 fifteen on the Choctaw road. I met 'im at the train and went over with him to my father's house to get supper. My father keeps a hotel. Defendant s'id he had been to Jenson that day. I happened to be at train. He was drinking. After defendant Tucker got his supper we went up in town, and went to William Wilson's billiard hall. We were there some 15 or 20 minutes. We went then over to a lemonade, and he knew Wm. Jones, and shook hands with him, and they commenced talking about a pipe. I turned around then and walked off a few steps, abo't 8 or 10 steps, and stopped to talk to the two young fellows that work in printing

office. I went back to place and I said to him, 'Marshal, come, let's go.' He got down from off the counter, and we went back over to billiard hall.

The man was closing the door just as we got there, and after he closed
209 up we walked down a piece, about a hundred yards, and Marshal said something about going to Old Town. I told him I didn't care if I walked over there or not. We went on about half a mile from South Town on the road going to Old Town, and there was a right-hand road, and we took the right-hand, and we lost road, and we went about a quarter and there was a house right up ahead of us, and I said, 'We are wrong,' that the house was not on the McAlester road. He said, 'No, we will turn and go across here and get into the road,' and we did not go far, I suppose 200 yards, until we walked up to another house. There was a light in house. He said, 'I am going to see who is in there,' and he walked to door and he knocked. The woman asked him, 'Who is there?' and he replied 'Marshal Tucker.' He said, 'Let me in,' and she said, 'No, I have company; I can't let you in,' and he replied that he wanted in, and struck the door with something, and about that time there was a shot fired, and the woman came out and said, 'Oh, you have killed Lou.' I never went to door to see if he 'ad or not, and he came out in yard from door seven or eight steps, and I was standing there, and I walked up towards water barrel sitting at corner of the house, and one of the women started up to him, and he said, 'Keep your hands off of me.' He had his hand up to his side, and she just stopped then. The two women who were here turned around and went to Old Town, and he had walked off about 8 or 10 steps, and then we both went on b'ck to South Town, where he had started from. We got over there right in town. He came in and went to our place. I went over and got Mr. Hooper and Mr. Lower, and we went back to house, and the woman was lying on floor dead.

We never touched her at all. We turned around and started back
210 to town and met Mr. Killpatrick, Mr. Lindley and two or three more gentlemen, I don't know who they were, and went back up there again and laid her out, and returned to town again. Lindley asked me where Tucker was at, and I told him he went down home, and he sent Mr. Neal down there to see if he was there. He went down and got Mr. Tucker, and Tucker came with him, and went to Jack Ellis's with him and turned him over to Mr. Ellis, and they took him and went to Mountain Hotel, and this was the last I seen of him until next morning. I had no arms and was in my shirt sleeves.

"Cross-examination: I know where Lou's house was; it was tolerable dark; there was a woman there also where Jones was. There were two of them when we first went there, and one of them went away when we came there. Defendant Marshal spoke of going over there before we went to this stand; heard none of the conversation that occurred between Marshal and Jones and the woman at stand. Marshal staid there 25 or 30 minutes. The printers I was talking to called Mr. Tucker out. Tucker came out, and they asked him if he had any whiskey, and he said he had no whiskey. He staid out about 10 minutes, and then went back into stand, and I still stood and talked with these boys. I went then back to door of stand, and said, 'Come on, let us go, Marshal.' He said, 'Well, all right;' I wanted him to go home. After we left billiard hall I wanted him to go home, and he said he did not care to go to bed. Then he said

he had some subpœnas for some witnesses, and was going over to Old Town. When we seen light we knew where we were at; do not remember meeting anyone on road; we were close to when we seen
211 light. The light was shining out of back window, and the door was on the other side from where the light was. Defendant Marshal went to door. I was seven or eight steps from him when he went to door. I suppose he had a pistol on. He had a belt. He had a pistol on when we le t house. Defendant drew his pistol when he told them to open door. He put his hand back to his *d*ide. He had his side to me, and I could not see. Then he hit door with something, like two or three times; he punched the door; it might have been a pistol. The shot seemed to be right there at the door; I suppose it was a pistol. When the women came out he was right there at the door. When he was told that he had shot Lou he said something, but I didn't hear what he said. The women were right at him, and I was not. He might have said something to them and I did not hear it. These women and Marshal came out to where I was. Defendant Marshal came first. I did not see his pistol when he came up; he must have put it up; I think he threatened to shoot the woman if she came up to him—something to that amount. If at this time he had a pistol he had it where I could not see it—down at his side. When he got to door he might have said that he was going to make them open up, or that he would do so, if they did not. I believe he did say something to that amount. When he said this he had his hands on his side. Defendant Marshal walked to door after the women came out and said, 'She is lying there;' and he turned around and walked off. He wanted to know if he had done it."

WILLIAM WILSON, recalled, says: "I and Tucker went up in town, and went up to Fish' stand, and he went in. Tucker drew pistol when
he punched door. When women came out he spoke to them, and
212 the other started up to him to shake hands with him, and he told her if he (she) did not stop he would shoot her; he had pistol in his hand. When he drew his pistol I told him, 'Don't do that.' He never made any reply. I seen the pistol no more. He fired one shot. When shot fired I heard some one falling in house."

213 LILLIE IBISON, having been recalled by the defense for further cross-examination, was examined by Mr. James B. Forrester, and testified as follows, to wit:

Question. You have been on the stand in this case before, I believe?

Answer. Yes, sir.

Q. Are you acquainted with a man named Foster, an old gentleman?

A. I seen the gentleman once.

Q. Where did you see him?

A. Here in the court room; in the court hall out there, rather.

Q. When was it, Monday or Tuesday?

A. I could not say which; I seen him one day this week; I could not say positively which day it was.

Q. You say you had a conversation in his presence?

A. I was setting there talking, and he was there.

Q. Who was present at the time of the conversation?

A. I could not say; there was several parties passing in and out, but I could not call their names at all.

Q. Was there a little boy present, some 8 or 10 years old?

A. I don't remember.

Q. I will ask you if you made this statement during that conversation, in his presence and hearing, that at the time, as you have already stated, of the alleged killing, when you were pushed back by Wilson, and as you stated in this conversation, as I understand, Tucker threatened to take your life, if you did not stat' that your life was just as valuable as Tucker's, and you would break his neck?

A. No, sir; I did not; that is all a mistake.

214 Redirect examination:

The ASSISTANT DISTRICT ATTORNEY:

Q. Did that old man talk to you any; go to you to talk to you about the case?

A. He asked me what I thought they were going to do with Marshal, and I told him I didn't know; and he asked me if Marshal went in the house, and I says, "He did not," and he says, "I heard that he went in the room," and I says, "It is all a mistake; he didn't enter the room at all."

Q. Did you know he was the grandfather of the defendant?

A. No, sir; I didn't.

Q. He came to you and was wanting to talk about the case?

A. Yes, sir; and he asked me what I thought they would do with him, and I told him I didn't know; I could not say; he asked me if Marshal went in the house, in the room, and I told him that he did not. After we got through talking he told me that Marshal was a grandson of his, and I told him I felt real sorry for Marshal, and I felt more sorry for his dear old mother than I did for him, but as far as my telling him that my life was as dear to me as Mr. Tucker's, or anybody else's, I didn't do it.

(Witness excused.)

215 Mr. GEORGE FOSTER, having been duly sworn upon behalf of the defense, was examined by Mr. James B. Forrester, and testified as follows, to wit:

Question. Can you hear well?

Answer. Sir?

Q. Can you hear me now?

A. I can't hear very well; talk pretty loud.

Q. How old are you?

A. I will be 80 years old the 15th day of June.

Q. Your first name is George?

A. Yes, sir.

Q. This defendant is your grandson?

A. Yes, sir.

Q. You saw that girl who just left the stand, didn't you?

A. Yes, sir; I saw her come up here, but I never heard her testimony.

Q. You saw who she was?

A. Yes, sir.

Q. Did you have a conversation or did you hear a conversation with her?

A. I can't say as to that; I don't know whether this was the one that was out there in the hall or not, the other day; that was a light-haired one, fair complected.

Q. Was it the one that testified here awhile ago that you saw?

A. I don't know whether it was or not; I could not tell from where I was setting now whether it was the same one or not.

The COURT. You might identify her as the same person.

(Lillie Ibison is here brought into the court-house.)

Mr. FORRESTER (of counsel for defense, to witness). Your eyesight is not very good, is it?

A. No, sir; not so very. They said her name was Fannie; I didn't know her name from the other.

216 Q. Is this the woman [referring to Lillie Ibison]?

A. No; I do not think it is; I don't think it is the one; it might be; I can't say; I can't say for certain; I believe, though, to the best of my recollection, that is the one; if I could see the other one I would know better about it.

(Here Fannie Orwig is brought into the court-house.)

The WITNESS. I believe from the tassel that she has got in the hat that she is the one.

The COURT. You believe this one (Fannie Orwig) is the one or the other one (Lillie Ibison) is the one?

A. I think it is the other one (Lillie Ibison) that went out.

Mr. FORRESTER (of counsel for defense). State what conversation you had with her or what you heard her say.

The COURT. I think he ought to be able to state with more correctness. He says he thinks the other one was the one he had the conversation with. [To the witness.] Are you satisfied of that in your mind?

A. Yes, sir.

Mr. CRAVENS (of counsel for defendant). Are you satisfied that the little one is the one you were talking to?

A. Yes, sir; I think she is.

The COURT. Go on.

The WITNESS. The way I come to know who it was——

Mr. FORRESTER (of counsel for defense). Go on and state what was said in that conversation, when and where?

A. The way I come to know who it was, my grandson was in the room, and she was setting there by a Choctaw lady, and she got up and went down stairs, and he come to me and said that was one of them women that was a witness against Marshal. My grandson came and told me

217 that was of the women that was a witness against Marshal, and I staid there until 'he came back again, and when she came back I moved up a little closer to her, and commenced questioning her about this affair, and she commenced telling *if* me, and I asked her a good many questions concerning of it, and she said—I told her I understood when that woman was killed that Marshal went in the house with his pistol, and she said he never done it; she said she opened the door and came out in the yard and Marshal was out there with a pistol in his hand, and swore if she didn't go away he would kill her, and Billy Wilson stepped in betwixt them and pushed her one way and Marshal the other,

and she said her life was as good to her as Marshal's was to him, and she was going to swear the truth if it broke his damned neck. I can prove that by another witness that is not here—has gone home—and who heard the same conversation. I told her I wanted her to swear the truth.

Cross-examination:

The ASSISTANT DISTRICT ATTORNEY. You say she said she was going to swear the truth if it broke his damned neck?

A. Yes, sir; that is what she said.

(Witness excused.)

Defense closes.

218 *Testimony in rebuttal.*

And the Government further to maintain the issues on its part offered in rebuttal the written application made by defendant to obtain his witnesses at Government expense, which is in the following words and figures:

In the District Court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
MARSHALL TUCKER, DEFENDANT. } Murder.

The defendant states that he is charged by indictment in this court with murder, and the following-named witnesses are material witnesses for his defence: Pink Hooper, Crocket Lee, Walter Hughes, & George Stephens.

By the three witnesses first named, who reside at South McAlester, he can show that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing and was incapable of forming any design. By George Stephens, who resides at Cameron, I. T., he can show that on the day before the alleged homicide he shot one load out of defendant's pistol, and after the alleged homicide it was in the same condition as when discharged by Stephens, which will appear from his and other testimony in the case.

These statements he believes to be true, and he is not possessed of sufficient means and is actually unable to procure the attendance of the said witnesses. Wherefore he prays that they may be subpœnaed at the expense of the United States.

M. N. TUCKER.

Sworn and subscribed to before me this the 26th day of Feb., 1893.

STEPHEN WHEELER, *Clerk.*
By W. B. PAPE, *D. C.*

219 To the introduction of which application for witnesses defendant objected; and his objection being overruled by the court, the prosecution read the same in evidence, to which the defendant at the time

excepted. Also introduced the following witnesses in rebuttal: W. O. Wolverton, William Wilson, William B. Pape, Fannie Orwig, who each testified as follows:

220 *Government testimony in rebuttal.*

The ASSISTANT DISTRICT ATTORNEY. I desire to introduce in evidence the application for witnesses in this case.

Mr. CRAVENS (of counsel for defense). I do not think that is competent testimony, under the statute I called the court's attention to heretofore.

The COURT. The court will admit it; you can save the point, if you want. Read it, Mr. Assistant District Attorney.

(Defendant excepts.)

The application for witnesses was then read to the jury, as follows, to wit:

In the district court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF, *vs.* MARSHAL TUCKER, DEFENDANT. } Murder.

The defendant states that he is charged by indictment pending in this court with murder, and the following named persons are material witnesses for his defense:

Pink Hooper, Crockett Lee, Walter Hughes, and George Stephens.

By the three first-named wiinesses, who reside at South McAles-
221 ter, he can show that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing, and was incapable of forming any design.

By Mr. George Stephens, who resides at Cameron, I. T., he can show that on the day before the alleged homicide he shot one load out of defendant's pistol, and after the alleged homicide it was in the same condition as when discharged by said Stephens, which will appear from his and other testimony in the case.

These statements he believes to be true, and he is not possessed of sufficient means, and is actually unable to procure the attendance of said witnesses.

Wherefore he prays they may be subpœnaed at the expense of the United States.

(Signed) M. N. TUCKER.

Sworn to and subscribed to before me this 20th day of February, 1893.

(Signed) STEPHEN WHEELER,
Clerk.
By W. B. PAPE, *D. C.*

On the back thereof is the following: United States vs. Marshal Tucker. Application for witnesses.

Allowed, Feb. 21-st, 1893.

I. C. PARKER,
Judge.

222 W. O. WOLVERTON, having been duly sworn by the Government, in rebuttal, was examined by the assistant district attorney, Mr. William M. Mellette, and testified as follows, to wit:

Question. W. C. Wolverton is your name, is it?

Answer. Yes, sir.

Q. Where do you live?

A. South McAlester.

Q. How long have you lived there?

A. A little over three years.

Q. Do you know the defendant, Marshal Tucker?

A. I do.

Q. Do you remember the circumstances of the woman Lulu May being killed?

A. Yes, sir.

Q. Did you visit the house where she was killed?

A. I did.

Q. When?

A. On the same night.

Q. What time did you get there?

A. It must have been half past 12 or 1 o'clock.

Q. How long did you remain there?

A. Until daylight next morning.

Q. I will ask you if you made any examination of that door?

A. Yes, sir.

Mr. CRAVENS (of counsel for defense). If the court please, we object to that. That is not rebuttal; it is not in rebuttal of any testimony we have offered.

The COURT. I think it is, Mr. Cravens.

The ASSISTANT DISTRICT ATTORNEY. I will say to the court that Mr. Cravens, in his opening statement, stated the defendant would show that the door was not powder burned, and I claim for that reason——

223 Mr. CRAVENS (of counsel for defense). We sent for a witness for that purpose.

The COURT. You did offer the circumstance as to make it impossible for it to be powder burned by this man who was hid behind the oak tree.

The ASSISTANT DISTRICT ATTORNEY. Yes; that the shot came from several steps off, and therefore it could not be powder burned.

The COURT. I think this would be in rebuttal.

Mr. CRAVENS (of counsel for defense). We save an exception.

The ASSISTANT DISTRICT ATTORNEY. I wish you would state to the jury what the condition of that door was so far as powder was concerned.

A. It had powder marks for about 7 or 8 inches all around in the place *there* the ball struck.

Q. How is that?

A. It had powder marks seven or eight inches all around it from where the ball struck.

Q. What was the powder marks?

A. It looked as though the grains of powder went right in the door.

Q. When did you examine it?

A. In the morning before I left there.

Q. That is, the morning after the killing?

A. Yes, sir.
Q. It looked as though the grains of powder had gone into the door?
A. Yes, sir.

Cross-examination by Mr. Wm. M. CRAVENS:

Q. You have lived there how long?
224 A. A little over three years and a half.
Q. What have you been doing there?
A. I first went there I was employed in the Choctaw Coal and Railway Company.
Q. Are you in their employ now?
A. No, sir.
Q. How long since you quit their employ?
A. About two years ago.
Q. They have only been there a little over two years, have they not?
A. I went to work on the survey when they first started.
Q. What have you been doing since that?
A. I have not been doing much of anything; have been working a little for this court.
Q. Have you not been sitting in this court room ever since this trial began or pretty much of the time?
A. No, sir.
Q. Haven't you been in the co'rt room?
A. No, sir.
Q. Were you subpœnaed as a witness here?
A. Yes, sir.
The ASSISTANT DISTRICT ATTORNEY. His name is on the indictment.
Mr. CRAVENS (of counsel for defense). I will ask you if you did not guard the defendant the night that this woman was killed.
A. Marshal Tucker was turned over to me——
Q. I will ask you if you did not guard the defendant that night?
A. No, sir; I did not.
Q. Were you not with him that night?
A. I was, sir.
Q. Where?
A. From Jack Ellis's gate we went to the hotel; from the hotel to the jail or little lockup in the hotel building in South McAlester, and from there I went to the house.
Q. Went to the house?
A. Yes, sir.
Q. I will ask you when you next saw Marshal Tucker.
A. The next morning.
225 Q. What time the next morning?
A. I think I went down and took him out of the lockup somewhere in the neighborhood of seven o'clock, maybe a little before.
Q. I will ask you if you did not take him out of the lockup before sunup.
A. No, sir; I took him up to the hotel for breakfast.
Q. Was it not before sunrise?
A. No, sir.
Q. What time was it?

A. Between 6 and 7; I think a little before seven.
Q. When was that?
A. It was October 16th.
Q. On October 16th, between 6 and 7, you took him out of the lockup?
A. Yes, sir; I think that was the time.
Q. And you were with him all that time, were you not?
A. Yes, sir.
Q. Where did you keep him that day?
A. We walked around from one place to another; took him in my house a part of the time, and went over to Old Town.
Q. Were you an officer?
A. Yes, sir.
Q. What office had you?
A. I was a deputy United States marshal.
Q. For what court?
A. This court.
Q. Have you ever served any process for this court, arrested anybody, and brought them in here?
A. Yes, sir.
Q. How many?
A. I don't know; several.
Q. I thought you said you had not been doing anything since you quit the employ of the railroad company.
A. I said I hadn't been doing much of anything.
Q. Just arrested 2 or 3 people?
A. Yes, sir.
226 Q. That is all you have done, is it?
A. Yes, sir; about all.
Q. That is about all you have done. Where did you go from to the Indian Territory?
A. Minneapolis.
Q. Were you raised at Minneapolis?
A. Yes, sir; I was born there.
Q. You have not been there since, have you?
A. Yes, sir.
Q. When?
A. I was home twice.
Q. Have you a family?
A. Yes, sir.
Q. How much of a family?
A. A wife and little girl.
Q. Where did you marry?
A. Minneapolis.
Q. Are the' with you out here?
A. Yes, sir; at South McAlester.
Q. Had you ever seen Marshal Tucker before that night?
A. No, sir; not before that night; I saw him on that night. I never saw him before that night that I remember.
Q. What became of that door?
A. I could not tell you, sir.
Q. Is it there now?

A. No, sir.

Q. How long did it remain there?

A. That I could not say. They asked me to bring the door in, and I told Mr. Shellburn to get it, and he went there and it was gone—the panel knocked out and gone.

Q. Where was the shot in the door?

A. I should say it was about a foot above the knob, right in the panel—in the neighborhood of a foot.

Q. Directly above the knob?

A. No, sir.

Q. Which way from the knob?

A. It was near the center of the panel.

Q. Was that to the right or left of the knob if you stood in front of the door?

227 A. If I remember correctly, it was to the left; I am not positive which way it was; which side of the door.

Q. You never examined it except that time, did you?

A. Oh, I have been up there since.

Q. But the panel was gone when you were up there since?

A. That was before——

Q. You examined it again before you came down here, did you? Were you examined before the commissioner as a witness?

A. Yes, sir.

Q. Before what commissioner were you examined?

A. Brizzolara.

Q. Was your testimony written down?

A. I think so.

Q. You were examined before the commissioner how soon after this killing?

A. I think it was Monday or Tuesday afternoon afterwards.

Q. The examination was had on the 18th, and this killing was on the 15th, I believe?

A. Yes, sir.

Q. Did you recollect as well then what you know as you do now, or is your recollection better now than it was then?

A. I just remember the occurrence, that is all.

Q. Did you state before the commissioner anything about the powder burn in the door?

A. No, sir; I don't think I did.

Q. You were examined before the commissioner, were you?

A. Yes, sir.

Q. Tucker gave up voluntarily to Jack Ellis, did he not?

A. He gave up to Neal; came up to Mr. Lindley's there and said then he wanted to give up to Jack Ellis.

Q. Was it not because Jack Ellis was a deputy marshal for this court?

A. I do not know; I suppose so.

Q. Lindley was not a deputy marshal for this court, was he?

228 A. No, sir.

Q. Wasn't Jack Ellis a deputy marshal for this court?

A. I don't know; I know that he used to be.

Q. Don't you know that Marshal Tucker said that that was the reason he wanted to surrender to Jack Ellis, because he was a deputy marshal, had been riding for this court?

A. I do not remember of his saying that at all.

The COURT. Were you asked anything about this powder burn before the commissioner?

The WITNESS. No, sir; I do not think I was; I am pretty positive I was not.

Redirect examination:

The ASSISTANT DISTRICT ATTORNEY. Q. For the reason you were not asked about it you did not make that statement before the commissioner?

A. Yes, sir.

Q. There wasn't any controversy about it, then?

A. No, sir.

Q. What was it you said about bringing the do'r here?

A. I believe it was you told me to have it brought here, and I telegraphed to Shellburn to bring it, and he went after it and it was gone.

Mr. CRAVENS (of counsel for defense). Did you see him go after it?

A. No, sir; but he told me, and I believe he is honest.

Q. You need not swear to what he said.

(Witness excused).

229 WILLIAM WILSON, having been recalled by the Government, in rebuttal, was examined by the assistant district attorney, Mr. William M. Mellette, and testified as follows, to wit:

Question. Do you know this young man, George Maxey, that testified in this case this morning?

A. Yes, sir; I know him when I see him. I am not personally acquainted with him; that is, I am not very well aquainted with him.

Q. What do you know as to whether he was at McAlester when this killing occurred?

A. If he was there I never seen him.

Q. What do you know of his being there before the killing?

A. If he was there he was there when I didn't see him. I was in town every day, and I think I would have been liable to see him.

Q. When did you see him there before the killing, how long?

A. I don't know how long it was before the killing.

Q. If you saw him there before the killing just state when it was.

A. I don't remember that I did see him there before the killing.

Q. Did he ever stay at your house?

A. He did when Mr. Miner had him arrested; he staid there.

Q. How long did he stay there?

A. He staid there a night; came there one morning—came there one day and staid all day and all night, and the next morning, or next evening, rather, they went off to Muskogee.

Q. Do you know a man named Pat up there that runs a restaurant?

A. Yes, sir; Pat Gleason.

Q. Do you know whether he was stopping with him at the
230 time this killing took place or not?

A. If he was I never seen him.

Q. How far was Pat's?

A. Well, it is just up in town from where we live; it is a quarter, I guess, or a little over, from where we live now.

Q. He had been to your house before that, but you don't think he was in town at that time?

A. No, sir.

Q. How many people live in South McAlester?

A. Why, there is, I guess, four or five hundred inhabitants, maybe more.

Cross-examination:

Mr. WM. M. CRAVENS. Q. Do you think there is no more than 4 or 500 there?

A. I could not tell; I am guessing.

Q. How far is it from the east part of the town to the west part; how long is the town, east and west?

A. To the west part of the town it is about three-quarters of a mile.

Q. The town is three-quarters of a mile long?

A. Yes, sir.

Q. How far does the town extend west of the M., K. & T. Railroad; pretty near half a mile, does it not?

A. Yes, sir; I expect it is.

Q. Half a mile west of the road?

A. Yes, sir; west of the M., K. & T.

Q. I will ask you if it does not extend half a mile east of the M., K. & T.?

A. Yes, sir; to the east end of town.

Q. Then the town is a mile long?

A. Yes, sir; what I mean is the business part.

2:31 Q. We are not talking about the business part; we are talking about the town. In the business part of the town you think there is about four or five hundred people?

A. No, sir; in the whole town I think there is between five and six hundred inhabitants.

Q. Did you take the census?

A. No, sir; I was just a making a guess at it.

Q. Where did you live at the time this woman was killed?

A. We lived right north of the depot, where the Choctaw depot is; it is 100 yards, I guess, or maybe further.

Q. From the depot?

A. Yes, sir.

Q. How far is that from the M., K. & T. Railroad?

A. That is about a quarter, I expect.

Q. Pat's restaurant was west of the M., K. & T., was it not?

A. No, sir.

Q. It was right on the east side?

A. On the east side, about 50 or 75 yards.

Q. At that time it was a quarter of a mile from where you lived to where Pat lived?

A. Yes, sir.

Q. You don't know who was stopping at Pat's at that time, do you?

A. No, sir; I don't know just exactly who was stopping there.
Q. When were you at Pat's before this killing?
A. Well, I never go in there; I pass by there though.
Q. You just passed by the door?
A. Yes, sir.
Q. Had you ever been in Pat's in your life up to the time of this killing?
A. No, sir
Q. You passed by?
A. Yes, sir.

Q. You had seen Maxey in town before this killing; you told
232 the assistant district attorney you thought you had?
A. I won't be positive I saw him in there before the killing.

Q. You don't know whether you ever did see him there?
A. Yes, sir; I have seen him there.
Q. Did you see him there after the killing?
A. Yes, sir; it was a good while after the killing I saw him there.
Q. How long after the killing?
A. Why, I don't know exactly.
Q. Where did he stay?
A. He staid at our house.
Q. How long?
A. After the killing he stopped over night, I believe, and the next morning he went on to Muskogee—I think he went on; anyhow, I am satisfied he was going on.
Q. You do not pretend to say that he had not been there before?
A. No, sir; I don't pretend to that *that*, but——
Q. You don't remember of seeing him?
A. No, sir.

Redirect examination:

The ASSISTANT DISTRICT ATTORNEY. A. I understand you to speak of seeing him there with Sam Miner; you don't remember whether that was before or after?
A. It was after the killing.
Q. You think it was after?
A. Yes, sir.
Q. He was brought there under arrest?
A. Yes, sir; and he gave bond and went back home, and his bondsmen gave him up to Mr. Miner; he went and got him again and brought him back, and taken him to Muskogee. That was the second time they brought him back.
(Witness excused.)

233 WILLIAM B. PAPE, having been duly sworn by the Government, in rebuttal, was examined by the assistant district attorney, Mr. William M. Mellette, and testified as follows, to wit:

Question. What position do you occupy; what is your occupation?
Answer. I am the United States jailer over here.
Q. Have you any other official duties to perform?
A. Yes, sir; I am appointed deputy clerk of the court to swear prisoners to applications for witnesses over here at the jail.

Q. What is that you have in your hand?

A. It is the application for witnesses in this case, the Marshal Tucker case.

Q. Did you swear him to it?

A. Yes, sir; I did.

Q. What questions did you ask him before you——

Mr. CRAVENS (of counsel for defense). I object to that; the paper has already been admitted in evidence, and I do not think, your honor, that it can be bolstered up by any post-mortem evidence.

The COURT. I think in view of the statement of the defendant it is competent to show what understanding he had of the paper, whether it was read to him and he was informed of the contents, or any steps taken by the officer swearing him to make him aware of the contents. I notice you in a very elaborate argument before me in a pension case took that view, and I had to discharge four men because the paper was not read to them and they were not informed of its contents. I thought that
234 rule was a good one then, and I think my ruling is a good one now.

Mr. CRAVENS (of counsel for defense). I think your honor's ruling in that case was correct, but I do not see that it is competent for the district attorney to question the witness about this paper.

The COURT. There may be a question raised in the argument as to whether the defendant understood the paper.

The ASSISTANT DISTRICT ATTORNEY. He said in his testimony he didn't understand it as the substance is there.

(Defendant excepts.)

The ASSISTANT DISTRICT ATTORNEY. Before you swore him to it what did you ask him?

A. This application was sent over there by Cravens by a one-armed boy; I think he works in Col. Craven's office, a stenographer. He brought it over, and told me that Cravens sent it over and said to swear Marshal Tucker to that application for witnesses, and I took it down in the jail and read it to Marshal Tucker myself, and let him swear to it right in the jail, and brought it back in the office and then I signed the clerk's name by me as deputy clerk. In looking over it—what makes me know it was that way—when I read this passage to him—Marshal will recol'ect that—"By George Stephens, who resides at Cameron, I. T., he can shot that on the day of the alleged homicide Marshal said it was not that day, but the day before the alleged homicide, and asked me to insert the word "before" in there and scratched out the word "of," and I did so, and then he swore to it.

Q. Then you put the day before instead of the day of?

A. Yes, sir; I scratched out the day of and put in the day before.

Q. You read it to him?

A. Yes, sir.

235 The COURT. You read it to him then as it is written now?

The WITNESS. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. Stephens is the one who was to prove that the pistol had been shot off before then?

A. Yes, sir.

Q. You scratched out the word "of" and put the word "before" in there?

A. Yes, sir; Marshal said he wanted it that way.
(Witness excused without cross-examination.)

236 FANNIE ORWIG, having been recalled upon behalf of the Government, was examined in rebuttal by the district attorney, and testified as follows, to wit:

Question. Do you know a couple of young men out there named Earl Mattison and Andy Hendricks?

Answer. Yes, sir.

Q. You have seen them out there, have you?

A. Yes, sir.

Q. Were you ever present when Lillie Ibison told them she would swear anything to affect Marshal Tucker; that she would do all she could against him to stick him?

A. No, sir; I heard them talking something, but I don't know what they said; I heard them talking so much I never paid any attention.

Q. How did the boys happen to be talking there?

A. I don't know how; they are acquainted with Lillie; I am not acquainted with them particularly.

Q. How did they happen to come up to you; what were they talking about?

A. They first asked us when the trial was coming off, and I says: "I don't know anything about it; we have been here two weeks," and I don't hardly know how it did come up.

Q. Did they say anything to you?

A. Yes, sir; he says: "What are you going to swear?"

Mr. CRAVENS (of counsel for defendant). Who says that?

A. Mattison.

The ASSISTANT DISTRICT ATTORNEY. He says: "What are you going to swear?"

A. Yes, sir; and I says "That is none of your business, but I will do the best I can; I will swear the truth if I swear anything;" I says:
237 "I don't consider it is any of your business."

Q. You say that Lillie talks a good deal?

A. She was talking with the boys; she is acquainted with all these boys; I never have any conversation with them.

Q. But the boys come there and talked to you about the case—asked you what you were going to swear?

A. They came up, and one of them set down by Lillie.

Recross-examination by Mr. CRAVENS:

Q. You paid no attention to it, you say?

A. No, sir; I did not pay any attention to what either one of them said.
(Witness excused.)

Testimony closed.

After the assistant district attorney had finished his argument to the jury and the court was about to charge the jury, the following took place:

Mr. FORRESTER (of counsel for defense). We have a witness who has just arrived who we understand was present at the time of this alleged killing, and entrance demanded at the door. This witness was not here yesterday——

The COURT. I do not think that is proper at this stage of the game.

Mr. FORRESTER (of counsel for defense). I wanted to ask permission to introduce the testimony.

The COURT. It is entirely out of place.

238 And thereupon, after argument by counsel, the court instructed the jury as follows:

239 In the circuit of the United States, within and for the western district of Arkansas, February term, 1893.

UNITED STATES
vs.
MARSHAL TUCKER. } Murder.

Charge of the court, delivered March 11th, 1893, 3 o'clock p. m.

PARKER, J.

Gentlemen of the jury, the defendant stands before you charged with the crime of murder, for having on the 15th of September, 1892, in the Choctaw Nation, in the Indian country, taken the life of Lula May, a white woman and not an Indian, by shooting her with a gun; and that such act of shooting was done under such circumstances as that it was in the law a willful act, and an act accompanied with malice aforethought. The case, according to the oath you have taken to try by law and the evidence, is to be tried by you in accordance with the terms of that oath. And as far as the performance of your duty and mine is concerned, we are to try the case in that way, your duty being to get at the truth and then to see whether under the law that I give you according to that truth the crime charged against the defendant has been committed. Public justice demands that this case shall be disposed of without fear, favor, or affection for any one; that no species of favoritism is to have any influence in the case upon the mind of any juror, bearing in mind that the party charged to have been killed occupies the same position of equality before the law as
240 does this defendant, and is entitled to the same measure of protection under the law for her life as is anyone else. I shall endeavor to make the law so simple and so plain to you that you can understand it without much effort. I shall endeavor to aid you by giving you the rules of law which will enable you in your research for the truth to find where it lies.

You will understand, first, that the date laid in the indictment is not material. If the proof shows that the crime was committed at any time within three years prior to the time this indictment was filed, which was the 26th of November, 1892, that would be responsive to the allegation of the time.

The first question to be determined in all these trials is whether or not the court has jurisdiction to try the case. That is to be determined by looking at the facts found in the case, and then ascertaining whether under the law regulating jurisdiction there is established a state of case that gives to you and the court a right to hear and determine it. To give jurisdiction the person killed must have been one within the protection of the laws of the United States. If the proof shows Lulu May, the woman

alleged to have been killed, was a white woman, she was then a citizen of the United States as far as jurisdiction being extended over the man who might have taken her life is concerned. It is alleged in the indictment that that is a fact, and if the proof shows it it but remains to ascertain if the court has jurisdiction oever the place where the killing was done to give full jurisdiction, the right to hear and determine. And if you find the evidence shows that the place of the killing, the house where Lulu May was killed, was three-quarters of a mile from the old town of McAlister and one-half mile from the new town, and one-quarter and one-half of a quarter east of the Missouri, Kansas & Texas Railroad, if it was located at that place, it was within the geographical jurisdiction of this court.

241 That being true, if the evidence shows it, and also it being true that Lulu May was a white woman, then the question of jurisdiction is settled, and settled as it can be only in one way, by the light of such evidence, and that is that the killing was committed in the jurisdiction of this court, and that we have the right to hear and determine it. We proceed now as touching the merits of this charge to see what is necessary to be found, and we take it up in detail, in order that we may lay aside the uncontroverted parts of it, and take into consideration that which is in controversy by concentering our minds upon it, that we may the better solve the controverted propositions.

First, you are required to find that Lulu May is dead. You go the evidence to ascertain that. If she was seen by persons after she was dead, and they have testified before you as having seen her dead, that fact is proven. Again, you are required to find that she died from violence of the kind named in the indictment—that is, she was shot with a gun or pistol. If the proof shows it was done with a pistol that is responsive to the allegation in the indictment that it was done with a gun, because a pistol is a kindred weapon; it belongs to the same family of weapons and inflicts injuries in the same way, and the allegation of one may be proved by showing the other. There is no controversy over the fact that a pistol was used in this case, or some sort of a weapon of a character that would be responsive to this allegation. You are to ascertain, then, if that wound was inflicted with a weapon of that kind and produced her death. You can only find that as a circumstantial fact at best, and it is so in every case. But a fact, although it is circumstantial, may be so near to the main fact—that is, the proposition that she is dead—as to almost

242 amount to what the law calls positive evidence of it. You will remember the evidence bearing upon that proposition. It was that while against or near the door of the house in which she was living, a shot was fired, blood was seen coming from her forehead, she fell dead, or fell and immediately died shortly after making the exclamation referred to by the assistant district attorney and the evidence. You take into consideration your observation in life and your knowledge of matters of that kind to enable you to come to a rational conclusion as to whether that was the cause of her death.

You may look to the nature of the wound inflicted, the part of the person upon which the wound was inflicted, and the length of time she lived after that wound was received, and you may come to the same reasonable conclusion upon it that reasonable men would come to when con-

fronted with like facts coming before them in the ordinary affairs of life. Again, you must find that this act which led to the death of Lulu May was done in such a way and under such circumstances as that under the law it was done willfully and done with malice aforethought. If it was done in that way there is but one crime here, there is but one condition, and that is murder. If it was done in that way there can be no other condition in it. It becomes necessary in this connection for us to pause and inquire as to what is meant by the law when it says that to make murder a killing must be done willfully and done with malice aforethought, because it is not any opinion of our own that governs in these things. It is the meaning that the law has attached to these expressions that we are to first understand, and then correctly apply, that we may make no mistake, because if it is true that the crime of murder has been committed it is a perversion of justice, it is a compromise with crime, it is bartering away the rights of the people who demand protection, for you to find anything else; and your oath and the oath of all those who administer the law in her
243 temples of justice, demands that you should name it a crime and not compromise with crime and say it is something else because it may be easier to say it or more agreeable to us for the time being to say it. Our duty is to correctly understand what this crime of murder is, how and when it may exist, and then by the light of the evidence that we may find to be true to see in this case whether it does exist or not. To enable us to see whether it does exist, we must know the meaning of these expressions which enter into it—the meaning of the expressions willful, and the phrase, malice aforethought, because they each have a legal meaning and a meaning that the law attaches to them. The law attaches a meaning to the word willful that is more comprehensive, that means more than the ordinary definition of the word, because when we use the word ordinarily we use it in a circumscribed way that the law does not use it, as you will learn when I give you the legal definition of that word, and it is the same with the expression, malice aforethought. If we have a case where the proof shows that there is legal willfulness, that it is done according to the meaning of the word willful, as the law defines it, and there is nothing in that transaction, nothing connected with that act which justifies it, or mitigates it, or reduces the grade of it; the crime is murder; we have in such a case of willful killing a killing that is murder, because willful, disconnected from these other conditions, means malice aforethought, means the doing of a wrongful act which results in death without just cause or excuse, and that is malice aforethought, when there is nothing confronting that condition which gives the party a right
244 to do it under the law, or enables the party to say that it was so done as that he could ask that the crime be reduced in grade. It is very important that we should correctly understand in this connection the meaning of this word willful, because it is an element that enters into the crime of murder, and it is an element of vast importance, because its existence may prove the existence of the other characteristics known as malice aforethought; from the same facts, from the same circumstances, from the same condition which shows the existence of willful, you may find, as the law tells you, the existence of malice aforethought. Now, let us see the meaning of the word, and I read from the definition as given by the court in another case (U. S. vs. Lewis) because it is printed, and I

can better express it in that way, and in fewer words than if I would do it orally: "The word willful, as used in connection with a charge of murder, such as that which is preferred in this indictment against this defendant, means intentional killing." I ask you to note well these words and their meaning.

"It means an intentional killing and not an accidental killing; it means an act which results in death that is intentionally done, and one that is not accidentally done."

There are two conditions named, and all through this definition of the word willful, viz, intention and accident, one is the direct opposite of the other. If there is proven in any case that which is defined as an accident, there is not in it that which is known to the law as an intentional act or intentional killing, because in meaning one is the opposite of the other. These two conditions in legal contemplation apply, one or the other of them, to every act that is done which produces death. It is either accidental death or it is an intentional death. Now, if we can get the meaning of the word accident in the law, we can the better understand the meaning of the word intentional, because the word intentional com-
245 prehends everything outside of an accident. I would to God that everybody understood the law in that way, and that it was upheld and enforced in that way. If such were the case human life would be safer than it is in this land. Our newspapers would not be full every morning with the recitation of what are called accidents, which are really murders or manslaughters; that is the truth about it.

In such cases where these killings occur, where precious human life, innocent human life, the most sacred thing known on earth, has been taken, and not accidentally taken, these are either murders or manslaughters, and not accidents. There are the fewest cases of the taking of human life that are purely accidental—that are pure accidents—and you will say so when I come to define that expression as the law defines it. "There is a great difference in the law between that which is accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death, that is outside of the definition of the word 'accident,' is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of the mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, or whether it grows out of a state or condition of the mind that the law denominates general malevolence"—that is, recklessness upon the part of men as to whether others live or die—and their carelessness as exhibited by conduct and action as to whether a possessor of human life continues to possess it or whether it is taken from that person. When a party is prompted by a feel-
246 ing of that kind, showing moral turpitude, showing moral recklessness, showing utter absence of any regard for the rights of his fellows, showing that he wantonly and wickedly and carelessly takes human life, he does an act that is as willful and as intentional and has it in as much malice aforethought (as you will learn presently, when I come to the definition of the expression) as though he had specific hatred or animosity or ill will against the party who he slew and slew for that reason. "That

which is an accident in the law is something which occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence."

Now, this principle of the law grows out of the fact that there rests upon all of us certain great duties, which are duties to our fellow man, duties to ourselves, because if we do not perform these duties toward our fellows there is no obligation upon their part to *pre*form them to us, and as a matter of self-interest we should perf*rom* this duty, which is the highest duty belonging to us and our fellow man, known as the duty to protect life. It is, therefore, our highest duty to protect innocent human life rather than to destroy it. The law consequently imposes upon us the obligation that whenever we may act or are about to act in such a way as to jeopardize human life we are required at that point to exercise the highest possible care to prevent that which may result in death to a fellow being. When we do that under the circumstances, and death ensues it is called death by accident, it is called a misadventure; it is not criminal, but before we can say it is not criminal we are required to exercise the highest possible care that we can under the circumstances, and if the agency we are using or that we have is a dangerous agency, the amount of care increases in proportion to the dangerous character of that agency, and consequently increases the danger to the life of the *of the* person who may be effected by the improper exercise or improper use of that dangerous agency. You take firearms, for example; when we come to handle them a man may have no specific purpose to kill anybody, but he so handles them recklessly and wantonly and wickedly as that from the handling of them in that way, and when characterized by these facts that that handling of them alone may generate, may cause to spring into existence that which the law denominates intent, and it is intent. We are required, instead of using these deadly agencies in a way so that as a natural and probable consequence life would be taken, to use them with the utmost care; we are required to exercise greatest possible amount of care to prevent injury. Is not this a good law; is it not a good rule; does it not carry out the purpose of the law to protect innocent human life? If so, why should not the principle in all its fullness, in all its protecting power, be enforced and administered by those who administer in the temple of justice? That is the calling you are following; that is the high vocation that you are engaged in; that is the responsible duty that rests upon you to so administer the law as to say in every case where crime exists that it does exist, and to properly name or to designate the character of that crime, whatever it may be, because in such a way alone is this measure of protection secured to each and every citizen who has not forfeited his life by his own conduct. "When a man exercises the amount of legal care exacted by the law and something occurs beyond that, that is not recognized by the law as his willfull act. The law recognizes that he does not do it willfully, but when he does an act"—now here is the test—"which naturally or reasonably, or probably, from its nature and the way it is done, produces certain results, that is held to be an intentional result, because the act is done in that way is intentional, and whenever an act is done and it is an act that may naturally or probably produce a certain result, whenever the act is intentional the result is intentional." So says the law. If you find the act was done intentionally you must neces-

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sarily find that the result was intended, if that result is a natural one, that usually, or probably, or generally may follow every act of that character. For instance, if I draw a pistol, present it at one of you, fire it at you—that is an act that usually, or probably, or reasonably will jeopardize your life, and as a consequence of such an act the life of the person at whom I fired, or the life of any one of you, if I fired into the crowd promiscuously, is destroyed. You are enabled to say, as reasonable men, as men of observation, as men of judgment, that there was intent upon my part to take your life, because, manifestly, I did an act that was intended, and the act is one which naturally, or probably, or usually produces death or a great bodily harm or great danger to life. How would you be authorized to say, you may ask, that the act was done intentionally? The easiest proposition to ascertain in the world, although it is a circumstantial one; you can not find it in any other way. When you come to look at this proposition, the like of which we are passing upon every day, in cases in which you are either acting as jurors or sitting here listening to others, you have learned long since, by the application of these rules, of the great value of circumstances, and, by listening to these propositions that are involved in these cases, of the great importance of that evidence and that they must be solved by it. Now let us see what other circumstances we can look to to determine whether the act I have put as an illustration was intentional or not. A pistol is said to be a deadly weapon, but is is not deadly unless it is used in a certain way. It is one of the most deadly agencies in existence when so used, but there must be some will power behind
249 it because it is inanimate, it is an automaton, and can not act of itself. When you see it being used in a way so as to indicate that there is some power behind that action, as reasonable men, as men who many times have observed these occurrences, there is no doubt but you at once become satisfied that he who shoots it at another within shooting distance of him, he who pulls the trigger, intends to shoot so as to jeopardize or endanger that other; you find it from the circumstance of drawing the pistol, the circumstance of presenting it, and the circumstance of pulling the trigger. Now, that is the way you find that the act was intentionally done. The law again says, "If a man presents a gun at another, fires it at him, the fact of the drawing of the gun, and presenting it shows that he wills what he does, shows that the act is a willful act upon his part, and when that state of facts exists, the act of presenting and firing the gun is recognized by common observation and common experience as a willful act. If that act consequently produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party by law, is said to have intended the result, and consequently to have willed it." That is the law, that is common sense, common reason, which is precisely the rule that governs you in making up your opinion. Take the case I have put, and you would conclude I was intending death or great bodily harm if I did the act which I used as an illustration, and you might use exactly the same means when you would come to that conclusion that the law says you are to use as reasonable and sensible men. "Intent is something that can be found only by inference. It can only be found by the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses,

the purposes for which it is constructed, and the results that are naturally and reasonably produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion."

250 We all know the character of these weapons; we have known it from our boyhood up; we know when used in a certain way they will produce a deadly result. The law holds us to know that which we become aware of by common observation. It does not exact any more knowledge of us in that respect than we commonly have, an' the law formulates rules and says that every one is held to know them just as they are held to know the law.

"This principle is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion, for this reason, when a man presents a gun or a pistol at another and shoots it at him the law says he intends to kill him, because the killing is a result that is natural and probable and reasonable."

You do not have to find any more than that in one of these cases you are trying where the party is charged with an assault with intent to kill. You find the man presented a gun at another, or a pistol at another, within shooting distance of him, and that makes a case. That is all there is to it. For the very minute that the bullet goes out of the gun it carries intent of the mind with the rapidity with which the bullet moves and carries it forward, and it is brought into existence by an act of that kind and it remains there, and that is the principle of it when the jury comes to tr' the case, whether the bullet hit the object or not, provided the object was within shooting distance. A little farther in regard to this matter that the act was willfully done. I dwell upon it for the reason I have already stated, because where a killing is done willfully and there is not in it that which justifies under the law of self-defense or one that reduces the grade

251 of it to manslaughter, when you find it is done willfully, in *in* the absence of either one of these conditions you must find that it is done murderously, for that element exists in it, as you will learn presently, because that element, as you will be told further on, simply means the doing of an unlawful or wrongful act without just cause or excuse, or in the absence of provocation that mitigates in such a way; in other words, as to show that the party had no excuse for doing it, or that the person upon whom it was done was doing nothing that was so far provocative that would give the party the right to ask the crime be named as one of less grade than murder, or that there was then surrounding him or affecting him that which he could claim the benefit of so far as to ask that the crime be reduced in grade.

"When you are called upon to find whether he intends to kill or not, you find, first, whether he presented the deadly weapon in shooting distance of him, and fired it at him, whether that was a willful act, and when you find that (as I have told you) from the character of the weapon used, and the manner of its use, because the weapon can not use itself; it can not present itself; it can not pull its own trigger; it can not of its own accord, or of its own will-power, because it has none, send the deadly missile in the body of the man who is killed. There is an intelligent will-power that does all that—I say, when you find a gun or a pistol has been held in that attitude and that it has produced a deadly result, as reasonable

men, as men of common knowledge, of common observation, you must come to the conclusion that the party willfully did the act, and when he willfully does an act of that kind, he willfully produces the result. A word in this connection as to how you may find how the act was willfully done:

252 "'The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man who is a voluntary agent, acting upon motive for the public good, for public policy, for the preservation of the rights of the people, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of a willful act is to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendence to destroy life, or to do some great bodily harm to the person assailed, the intention to take life, or to do him some great bodily harm is a necessary conclusion from the act."' It is a conclusion that you as reasonable men must find from an act of that character. Now, it seems to me that is sufficient as to what is meant by willfully, as used in this connection, and with the further explanation given by the law as to how you may find the existence of this characteristic of murder, it becomes easy to understand what it is. It is necessary to find whether it exists in this case or not, because you are authorized and it is your duty in this case to see whether it exists or not, whether the pistol spoken of by the witnesses was used in such a dangerous and deadly way as that it had a tendency to destroy the life of Lulu May, or to inflict upon her some great bodily harm, and if you find it was

253 presented and fired in such a way as to do that, or that it might probably, or naturally, or reasonably do that, you have a right and it is your duty to come to the necessary conclusion in the language of the law that I have read to you, that it was the intent of the party who fired that weapon to inflict whatever consequence might naturally, or reasonably, or probably follow from the doing of an act in that way.

Now, it is not necessary to create this state of case that the party should have in range with his eye the object at which he shot with the deadly weapon, for if it is a known fact that persons are in a dwelling-house and a party shoots into the door of it—that is the place where they have a right to be, it is their castle, no one has a right to improperly or against the will of the occupant to invade it except for a lawful purpose—and if there is brought to the attention of the party that there are persons in the house, as it is by the fact of the knowledge upon his part that the house is inhabited, and as it may be again brought to his attention from voices on the inside or from persons speaking on the inside that persons are there, the shooting into the door of that house willfully and intentionally is the doing of a dangerous and reckless and wanton and wicked act upon the part of he who does it, and an act, too, from which you have a right to infer that it was one that might possibly or naturally or reasonably inflict deadly danger upon those on the inside, and consequently, under the law, if a man

goes to another's place and sho'ts into it at night, or in the daytime, if you please, if he shoots into the house, as in this case, through the door, from the fact it is inhabited, that it is occupied, he is required to stay his dangerous and wicked hand from an act of that character, and if he
254 does not hit anybody on the inside, under the law he is guilty of an assault with intent to kill inflicted upon each and every one of the inmates of that house who may be in there at that time. Is that right? What is this protection that extends around the castle called the power of the law? If this is not the correct principle, what authority and what power and what security is there in it if a man can shoot into your door, and then when confronted by a jury of his countrymen he is permitted to say that he had no intent, if one of the inmates of that house fell dead as the effect of a shot through that door?

What safety, what security is there for life in that dwelling-house, if that is the law. It is not the law. Of all other places on this earth, and especially in the hour of night, the law throws its panoply of protection over the castle of every resident of it, and it is not only the castle of the rich, it is not only the castle inhabited by the family of wealth, power, and influence, but this sheltering power is also spread over the humble castle of the lowly, and even the sinful, and it is not for the lustful man, it is not for the assassin, it is not for the reckless man, it is not for the man who has no regard for human life to say when they shall loose their lives, especially when we contemplate that it is the lust and the crime and the wickedness of men that puts these poor unfortunate creatures in that condition. Then, I say, if you find in this case that there was a ball intentionally fired through that door, if there was a ball willfully fired through that door, if it was done intentionally, and you may find it was intentionally done in the manner in which that pistol was used, or the manner in which the deadly weapon was used, if it was used in such a way as to pro-
255 duce a deadly result by that act, by the firing through that door, from the act of firing alone you have an intentional act, from the act of presenting and holding that pistol in such a position as that the ball would enter that door, and the pulling the trigger you have the doing of an intentional act, and if that act was one which might naturally or probably or reasonably produce death, and as to whether it was or not you may go even to the very consequences of the act, you may take the very consequences that was produced by that act in the shape of the death of this woman, Lulu May—and I say if you have these conditions shown by the proof you have a state of case from which you must necessarily infer the doing of an intentional act which produced a deadly result, and consequently a deadly result that was intentional, and consequently a deadly act that was willful. And when you have found that, and when you are able to find that there is nothing in the case that under the law of self-defense that would justify it (and I will not take up your time to give you the law of self-defense, because there is not even the shade of a shadow of evidence offered here upon that proposition; this woman was doing nothing at the time she was killed that would give anybody the right to take her life), if there is an absence of a condition that would reduce the grade of the crime, and I will tell you after awhile what that condition is, you must necessarily find from the doing of that willful act that there was an act that had attending it malice aforethought,

because, as I have already told you, where there is a killing that is willfully done, because it is intentionally done, and it is not an act that is justified under the law, or that can be mitigated under the terms of the law or its provisions, it is not necessarily an act that has in it the distinguish-
256 ing trait of murder known as malice aforethought, because malice aforethought springs out of the doing of an act willfully in such a case as that, it springs out of the doing of an act intentionally. Let me illustrate it. You see a man shoot another in the street; he sees that other coming down the street and he shoots at him, or he shoots in the direction of where he is so as to kill him, and these are all the facts you have before you; there is nothing else in it presented before you; what do you infer? Why, instinctively you conclude that if he killed him he killed him wrongfully, improperly, and wickedly, so far as that goes, and in the absence of everything that would be a cause for such a wicked act you conclude at once it is murder. It is not necessary for you to have any judge or any lawyer or any number of courts to tell you that is murder; you know it instinctively. How do you know it? You have not fathomed the man's mind to know whether this characteristic called malice aforethought was there or not. You say I looked at the act of the man; I saw a wanton and wicked and reckless act that destroyed a precious human life, and I saw it done without cause or in the absence of legal provocation. From the very doing of it, from the manner in which it was done, I concluded it was a willful act; I saw nothing to justify it, I knew of nothing to mitigate it, to make it a less crime than that which is known as the highest in the law, and, therefore, I come to the conclusion instinctively that it is murder. And you would conclude properly; your judgment would be correct; your conclusion would be authorized by reason and by the law. It is precisely what you are authorized to do when you are in the jury box when a case of like character is presented. Let
257 us see now if that is true. First, we will ascertain what is meant by this thing called malice aforethought. We have got at what is meant by doing an act willfully; we have ascertained how it may be found, and I apprehend we have a reasonably good understanding of it.

"We come next to the phrase 'malice aforethought' to see what it means, and to see how we may find its existence. Because it is something that originates from the mind of the party doing the act, we must find some way or another of getting at the condition of the mind that is doing that act. If we can not fathom it, if we can not penetrate its inmost recesses to see what is going on there, we must adopt some other means that are reasonable, some other process that is rational, to get at the mental condition of the party, because both of these characteristics of murder spring from the condition of the mind of the party. The law says we may do it by circumstances. We may do it by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of the facts and circumstances that surround the act going to characterize it, to show what the manner of act it is, bringing to bear upon the condition of facts of that kind the observation of men of mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great responsibilities and duties devolving upon them as jurors. As I have remarked to you before, when malice aforethought exists,

murder exists." If the facts show that malice aforethought exists in this case, that Lulu May's life was taken willfully, and this other element surrounded the transaction known as malice aforethought, her killing would nec-
258 essarily be murder and nothing else. What is this element of this crime? The law expresses its meaning in several ways. It says by one definition that it is the doing of a wrongful act without just cause or excuse, in such a way and under such circumstances as to show it was done wrongfully, and that it was done in the absence of that which would give the right to the party to defend against it, or that it was done in the absence of mitigating circumstances. Again, the law defines it as the doing of a wrongful act without just cause or excuse, in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. As I have told you, when we are living in society we have certain great duties resting upon us, and the highest one is to protect innocent human life. If we so far forget that duty as to destroy innocent human life that is under the law, we can not take that life and claim the law of self-defense, or that we can not ask for a mitigation, if we take human life because of special spite or grudge, or ill will or general malavolence, because of general recklessness of purpose, because of disregard of the right to life that may be possessed by another, because of moral turpitude, and in the absence of legal provocation, and we willfully destroy such life, that has in it the highest characteristic of the crime of murder known as malice aforethought, and it shows we have a heart void of social duty, and we have a mind fatally bent upon mischief, because the doing of the act in that way shows we have forgotten our duty to our fellow-men, and the doing of that action in a reckless and wanton and wicked way
259 shows we have a heart void of social duty and fatally bent on mischief. Again, the law defines it, and tells us how it may be found, and it says: "It can only be found by circumstances, because malice aforethought, like willfully, is something which exists in the mind that is necessary to be found to make up the elements of the case, and as you can not get into the mind to know what is going on there (and you could not tell what was transpiring there if you could get into it), you must learn it in some other way; and there must be some rational way by which you may learn it, some way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way by which men may arrive at conclusions. It is from the nature of the transactions, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent act or criminal act, and if a criminal act, what was the nature of that criminal act.

"Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased, in particular, as any evil design in general * * *." We do not have to have special hatred against the party we kill to make it malice aforethought; if we do it in a reckless and wicked and wanton way the law says it evinces the existence of an evil design in general, a wicked heart, the absence of moral perceptions, a total disregard of moral duty, a total absence of that which is willing to recognize the rights of other peo-

ple, and when such a condition exists it is murder just as well as
260 when this condition of mind grows out of special hatred or animosity or ill will. You take the case of a person killing another who he never saw or never heard of before; how could he have special spite or grudge or ill will? That condition arises out of a certain relation between the parties, and that relation must be founded upon acquaintance, there must be some feeling between them, some misunderstanding, laboring under some real or imaginary wrong to create that condition, and that can not be when a party kills another who is a stranger; yet it would be horrid, it would shock the minds of a law-abiding man to say that because a stranger was killed there was no murder in it, if he was killed unlawfully, without just cause or excuse, in the absence of legal provocation, because in such a state of case it is murder just as much as though he killed because of special spite or grudge or ill will, because it is a manifestation of an evil design in general that may be so exerted against mankind as to destroy them, take away their lives, as well as a purpose exerted that is founded upon special spite or grudge or ill will. "The dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act; and it may be either expressed or implied in law. Express malice is when one with a sedate, deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man willfully poisons another. In such a deliberate act the law presumes malice,
though no particular enmity can be proved. And if a man kills
261 another suddenly, without any or without considerable provocation, the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause."

"Malice is an intention to do bodily harm." * * * If a man as manifested by his acts, such as shooting at another, manifests an intention to do bodily harm, and that intention as manifested takes away the life of another, if there is nothing which gives him the right to do that bodily harm, or no condition surrounding him mitigating that crime, the very intention that surrounds it makes malice aforethought, "a formed design to do mischief." It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and deliberately bent on mischief. It imports premeditation. Let us see what is meant by that. You will ask how long does a man have to think about doing an act which results in death before he does it in order to show premeditation. Well, suppose that an innocent citizen is killed without any just cause or legal provocation; what difference does it make to him how long the man has thought about it; what difference does it make to the community? We must say that premeditation may be a condition of mind that springs into existence cotemporaneous with the doing of the act, and yet it is premeditated, because if a man draws a deadly weapon and presents it at another, or even he is drawing it in that violent way, that other need not stand until he is shot down. Why? Because the other sees from the doing of the act,

the drawing of the deadly weapon, an act of violence being executed, he sees in that way a deadly purpose, and he can then and there act even to the
262 extent of the taking the life of that other, if necessary to save his own life. Why does he have that right? Because he sees premeditation manifested by the drawing the deadly revolver, even before he presents it; he has had no evidence of a purpose to kill before that; he does not know that the man has ever thought of a design to kill him, but he sees it spring into existence there, and from that fact alone he has evidence of a premeditated design to take his life, and he may take the life of such aggressor if he can not avoid the danger in any other way, and that is right. Then premeditation does not require that a man should think of the purpose to kill for a year, or a month or a day or an hour; it may be the conception of a party that is instantaneous; it may spring into existence and may be contemporaneous with the execution of it, and yet it is premeditation. There must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection it none the less is malice.

"Malice is an intent of the mind and heart; the doing of a wrongful act without just cause or excuse, or in the absence of that which justi-
263 fies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, or in the absence of mitigating circumstances which produces death, it is murder, whether it grows out of special spite or animosity, or a specific design to take life, or the purpose to do some other act of a wicked and malignant and criminal nature, which, because of its nature, and the way it is done, a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse, which results in murder. It evinces a formed design to do such mischief as may deprive a fellow-being of life.

"Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

"You can not tell by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof, and circumstantial evidence, the condition of a man's mind. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for."

Now, how can you discover it? How can you find the existence of a mental condition by proof of that character? You can not prove it by positive evidence, and the only way you can prove it is by circumstantial evidence; that is the only way you can get at the doing of an act, by the manner in which it was done. We do not do anything in this world that does not leave evidence of a purpose in connection with the act, and if the

circumstances surrounding it are brought to the light of day before the jury that they may look at them they will characterize that act and enable them to name it correctly. There is no question about it. It is so
264 ordained that human conduct may be properly designated, it is so arranged that the circumstances attending the doing of an act may be taken hold of and investigated, compared, and analysed by intelligent means, and from these circumstances alone we are able to ascertain what purpose the party had in view when he did the act. If he had a purpose to do an act that was malevolent, was a wicked act, without just cause or excuse, or in the absence of legal provocation, in the absence of that which justifies or mitigates, if he did an act that grew out of general malevolence, general recklessness of human life, and that act was of a character that destroyed human life, you may take that act as tending to enable you to characterize the condition of the mind of the party at the time he did it, and you are not required to find a condition of mind that would evince any other circumstance of malice aforethought, you are not required to find that he had special spite or grudge or ill will against the party who he may have slain, because if he slew from recklessness of purpose, from that sort of feeling, from that sort of mental condition, you have a condition that has malice aforethought in it.

"If, for instance, it becomes necessary to show that A shot at B, and C comes in and says that he saw A shoot at B, that is positive evidence of it, positive proof of the shooting, of the fact necessary to be found, and because the evidence is so near to the thing itself it is called positive evidence of it; when it is further off from that thing, but is still evidence standing around the thing done, it becomes circumstantial, or, in other words, circumstantial evidence. Circumstantial evidence is proof that may be equally cogent and equally powerful proof of the existence
265 of the thing, but it is not the thing itself, but is that which shows the existence in the shape of the surrounding facts and circumstances, in the shape of that which attends every transaction in life, which goes to characterize it one way or the other; which goes to show either that it was a criminal act, a criminal transaction, or that it was a transaction that was honest and upright and void of crime.

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty.

"The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind, and the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was." Bearing in mind that under the law he is held responsible for any act or any consequence that may naturally or reasonably or probably spring from an act willfully done by him, and if he does an act that is willful, and there results a deadly consequence from that act, that consequence is denominated by the law as a willful consequence, and if the conditions are absent which would give the party a right to do the act, because of the exercise of the right of self-defense, or that he has

a right to ask for a mitigation of the crime, you have the willful
266 doing of an act in such a way as that it is attended with malice aforethought, and it is consequently murder. "As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express.

"It can not be demonstrated as express.

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer more or less satisfactorily his intent from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon."

I say to you that when a deadly weapon is used so as to produce death, and there is not attending the use of that weapon that which gives the party the right to claim he had a right to use it under the law of self-defense, or to ask for a mitigation of the crime, if you find the willful use of a deadly weapon from that condition, and an absence of these two others, you must necessarily find malice aforethought, because the
267 doing of a wrongful act willfully and intentionally without just cause or excuse, or in the absence of legal provocation which produces death, is murder under the law, whether it grows out of special spite or grudge or ill-will, or whether it is generated from a condition of general malevolence.

"Malice is to be inferred from the attendant circumstances surrounding the transaction, and the jury have a right, and it is their duty to, look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or the parties who engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.

"Now anything that shows deliberation, anything that shows a premeditated purpose to do a wicked act or a willful act that might result in death, is evidence that may be considered by the jury as evidence of malice, and of the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly existed in the mind of the party or parties who killed or the purpose to do a willful act that might result in death is shown by the actions of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts which goes to show the party had a right to do what he did do. The law lays it down that

the deliberate selection and use of a deadly weapon shows premedi-
268 tation; shows that the act was thought of beforehand; and whenever a party enters upon whatever unlawful or criminal enterprise he may enter upon prepares himself with a deadly weapon, with the purpose of using it in a wicked or unlawful enterprise, if it be one of that character enabling him to consummate and carry out that enterprise, the selection of a weapon for that purpose is evidence of the existence of malice aforethought; is evidence of the existence of a purpose to do a wrongful act without just cause or excuse, in such a way as to show that the party who does it has a heart void of social duty and a mind fatally bent on mischief.

"That is the general definition of malice. It shows a purpose to do a wrongful act without just cause or excuse. You ascertain how the killing was produced; the way it transpired; the way it was done. You see what character of weapon was used; you see whether that weapon was prepared beforehand; whether it was deliberately and willfully used at the time, and in a state of case where the evidence shows that the killing was willfully done, if there is an absence from the case of that which shows that the party had a right to so willfully kill upon the law of self-defense, or that the killing was willful, but there were mitigating facts attending it, the proof which shows it was willfully done shows it was done with malice aforethought; and in a case of that kind the very same degree of proof that establishes a willful killing would establish a killing with malice aforethought. Now, these are the two elements which make up this crime—that the act was done willfully, and done with malice aforethought." If these exists in this case it is your duty to find the first
269 proposition involved in this charge is established, and that is that there was a crime committed, and that crime was murder."

The second general deposition I proceed to call your attention to is whether this defendant was the party who did the act as charged in the indictment. If he was, and the act was of the character I have named as one which constitutes murder, and it is a condition that is established beyond reasonable doubt, you can not escape the performance of your duty as embraced in the oath you have taken, and as embraced in the language of the law, which says to you to discharge your duty as becomes good citizens and good jurors, and you can not escape it in the event that murder exists.

The defendant says he did not do this shooting, but if he did do it it was not murder. That makes it necessary to define this other crime known as manslaughter. When I define it I do not say to you that that is the crime in the case; I leave that to your decision, I simply giving you the principles of the law which define the crime. Now, there are conditions out of which this crime of less grade may grow. The condition out of which manslaughter usually grows is a state of case where there is an affray between two parties; two men are engaged in a fight with their fists or hands; they become excited, their minds are disordered by passion, the whole thing may be wrongful upon the part of each, but in a condition of that kind if one of them would suddenly use a deadly weapon without any previous selection of that weapon or preparation to use it, if occasion offered, and took the life of the other, the law in its commiseration for the frailty of human nature would say it is manslaughter. That

is not a condition that can apply to this case, because it is not claimed,
270 and if it was there is no foundation for the claim that Lulu May, the woman said to have been killed, was in an affray at the time with this defendant, Marshal Tucker. The only consideration in this case that would produce manslaughter would be a condition upon the part of this defendant of such a character as that his mind was incapable of forming an intent to kill, or to do a wicked act that might kill. If his mind was in that condition his act is then said by the law to be manslaughter. Now, you will understand presently the figure that drunkenness cuts in a case, but in this connection, as I have just passed the subject of malice aforethought, I read from Mr. Bishop's Criminal Law on the subject of how a man may be guilty of murder when he does not even intend to take life.

"The common law divides indictable homicides into murder and manslaughter; but the specific intent to kill is not necessary in either. A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime. And the doctrine is that the intention to drink may fully supply the place of malice aforethought; so that if one voluntarily becomes too drunk to know what he is about and then with a deadly weapon kills another he commits murder the same as if were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from it altogether its indictable quality," unless the mind of that party is reduced to a condition where it is incapable of forming an intent of any kind. If the party is in a condition so as to know what he is about, drunkenness does not reduce the grade of the crime, as you will learn presently.

271 Now, manslaughter is defined to be the unlawful killing of another without just cause or excuse, and when there is an entire absence of the facts and circumstances that would cause you to find the existence of malice aforethought or the absence of the existence of malice aforethought; it is the unlawful, willful killing of another without the presence of malice aforethought; it may be done willfully, but it is not done in such a way as that there is malice aforethought attending it. Now, I say the next proposition to ascertain is whether this defendant is the party who took that life; that is, whether he inflicted the wound upon Lulu May which produced her death. If he did not, or he was not there as a party to it or he was not there aiding another to do it, he is not responsible. If it was done by another, and he was there aiding or assisting or counselling or advising him by words or actions or conduct, he is just as responsible as though he did it himself. It is not claimed in this case that that is the condition, however, and it is useless for me to spend any time telling you what is meant by the law affecting a man who may be an aider, an abettor, who does not with his own hand do the act, because it is claimed by the Government that the defendant himself is the author of this act; that is to say, he with his own hand fired the pistol at Lulu May which resulted in her death. It is for you to say whether that is the case or not, and you are to say so from the evidence. You are to go to this house at the time of the killing; you are to see what the purpose of the defendant was; you see whether he or another was trying to get into that house

at the time; you are to see what the facts and circumstances were, whether or not he was the one that was demanding admittance; you are
272 to see what these facts and circumstances all were as connected with the killing, and I will call your attention to the rules to be applied to the testimony of witnesses more fully after awhile. You are to see whether the facts and circumstances in the shape of the powder burn on the door either contradicts or corroborates this witness brought here at the eleventh hour. He locates the party who he claims it was fired that shot so far from the door there could not be any powder burn there from such shooting usually or naturally or probably, then the fact of powder burn upon that door would be a contradicting fact. Then you are to see whether or not from the whole course of his conduct, his appearance before you, his manner of testifying, his concealment to the last moment as a witness, his being brought here without being applied for by the usual method when other witnesses were applied for and brought by this method, and all these attendant facts, from all of them you are to see whether he is what is called and known in common parlance as an ex post facto witness, whether he is nunc pro tunc—a now for a then—somebody gotten up for the purpose of manufacturing a defense here, a defense that did not exist then; or whether he was there and saw the occurrence, and saw the shot fired by somebody else other than the defendant. These are things that you must necessarily pass upon, because you are to pass upon the proposition as to whether the defendant was the author of that act; but as to this further on when I come to give you the rules of law that are directory upon you as to the weight of testimony, and as to how you are to look at it after it appears before you. You have a right, I say, in this connection, to look at every circumstance that has been made mani-
273 fest by the proof as contained in the testimony of any witness or any number of witnesses that may have been brought before you, that you may get at the truth of their testimony, how they know these facts or circumstances, where they got them, how they got them, the character of these facts, the character of the witnesses, how they come to be here, for all these facts and circumstances are just as relevant and just as pertinent and to be used by you just as well when you are sitting in the jury box here as you would use them as citizens, if you were seeking to investigate a charge to find out if a man or a number of persons were telling you the truth; you apply precisely the same rule.

Now, it is claimed that the defendant at the time of this killing was intoxicated. That makes it necessary for the court to detain you sufficiently long to enable you to see how this condition of mind is regarded by the law; that is, when a man is in that condition if that *that* exonerates him from the criminal charge, if he has produced death, for example, or if it does not exonerate him what figure it cuts. Now, we must be governed in this respect by the law as in all other respects, because you and I have no business outside of the law. When we have found these rules that it gives us we are to be governed by them; we can not escape that, we have no other desire than to be governed by the rules of the law, because that is what you have sworn to be governed by, and that is what I have sworn to be governed by. We must go to this law to find out what these rules are. There is no reason why these rules should be per-

verted or cast aside in this case any more than in any other case.
274 They should be correctly, fully, and impartially applied in every case that comes up for trial in the courts of justice in the country, and every case should be determined by the light of these rules of law, and by the light of the facts as shown by the testimony. There are numerous decisions of the courts, and there are numerous decisions of judges upon this question as to what figure intoxication cuts in a case.

Now, the rule varies but little in this country and England, from which it is derived, and I call your attention to the rule of that country as recently proclaimed to the world in the case of Regina v. Davis, "quite a recent case in English jurisprudence, and contains so excellent an exposition of the law as understood in that country, that we can not refrain from quoting it in full. The facts are that Davis, aged thirt'-eight, was charged with feloniously wounding his sister-in-law, Jane Davis, with intent to murder her." If he had killed her he would have been charged with murdering her, because in attacking a man with intent to murder him is but one step from murder, and the only difference there is, is that in one case the party dies and in the other he does not. If a party is charged with shooting with intent to murder another, that means he did it with malice aforethought; that he did it willfully and with malice aforethought. "He had previously been drinking heavily, but on the day of the attack was sober. He threw her down and attempted to cut her throat with a knife. Usually he was a very mild, quiet, peaceable, well-behaved man, and on friendly terms with her. When at the prison he said: 'The man in the moon told me to do it. I will have to commit murder or I must be hanged.' Two medical men after examining him, testified
275 that he was suffering from delirium tremens, resulting from over indulgence in drink. They said he would know what he was doing, but his actions would not be under his control. In their opinion neither the fear of punishment nor legal nor moral considerations would have deterred him, nothing short of actual physical restraint would have prevented his doing as he did; that he was disordered in his senses, and would not be able to distinguish between moral right and wrong at the time of the commission of the act. He recovered in a week, and was then perfectly sensible.

"His counsel claimed that he was of unsound mind at the time of the commission of the act, and was not responsible for his actions."

Now, of course, a man to be of unsound mind, not to be responsible at all, means that a man is insane, because that is the only degree of unsoundness that the law recognizes as one that entirely excuses a man from an act that results in death that otherwise would be criminal.

"Judge Stephen charged the jury as follows: 'The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last, with the intent to murder her. You will have to consider whether he was in such a state of mind as to be thoroughly responsible for his actions. And with regard to that, I must explain to you what is the kind of degree of insanity which relieves a man from responsibility. Nobody must suppose—and I hope no one will be lead for one moment to suppose—that drunkenness is any kind of excuse for crime. If this man had been raging drunk, and had stabbed his

sister-in-law and killed her, he would have stood at the bar guilty
276 of murder beyond all doubt or question. But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible." That is a condition of insanity; he has delirium tremens—looses his mind—he is then insane just the same as if he would loose it from taking any other narcotic, any other stimulant, or loose it by means of a blow on his head, or anything else. The test is whether he has lost his mind so far as to know whether it was a right or wrong act that he has done at the time.

"'In my opinion, in such a case, the man is a madman, and is to be treated as such, although his madness is only temporary.'" He is giving the law concerning the defense of insanity. A little further on he continues: "A person may be both insane and responsible for his actions, and the great test laid down in McNaughton's case, 10 Cl. & F. 200; 1. Car. & K. 130 n, was whether he did or did not know at the time that the act he was committing was wrong. If he did, even though he were mad, he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you can not think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, any disease which so disturbs the mind that you can not perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong.

Delirium tremens is not the primary, but the secondary, conse-
277 quence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act. If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity; but if you are not satisfied with that, you must find him guilty either of stabbing with intent to murder, or to do grievous bodily harm."

I will now call your attention to a leading American case, where the principle is laid down as to what figure drunkenness cuts in a case:

"One of the leading cases in this country upon this subject is People *v.* Rogers (18 N. Y., 9). Rogers was indicted for killing another with a knife, and on the trial evidence was introduced without objection to show the prisoner was drunk at the time of the murder. His counsel requested the court to charge the jury that drunkenness would reduce the crime to manslaughter, which request was refused. In speaking of the maxim that drunkenness is no excuse for crime, the court said: 'It will * * * occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security

and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in
278 holding a person responsible for his acts committed in a state of voluntary intoxication. It is the duty which everyone owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, as far as lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable.'"

That has reference to a state of insanity.

"But if, by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society."

I will now read to you the law as declared in a case tried in the State of Tennessee.

"Another leading case upon this subject is Cornwell v. State (Mart. & Y. (Tenn.), 147). This is an earlier case than People v. Rogers, by thirty-one years. The prisoner was convicted of murder, and urged his intoxication as an excuse. To this it was answered: 'Three cases of conviction for murder have been brought before this court at the present term, in two of which the prisoner was defended in the court below on the ground of madness, occassioned by drunkenness; and yet in neither does it seem to us was there a colorable foundation for such a defence. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these causes very untenable positions have been assumed, and very dangerous doctrines have been announced by counsel.
279 And, from what was stated by some of these counsel, those doctrines have been repeatedly urged, and sometimes sanctioned in the courts below. It has become fashionable of late to discourse and philosophize much on mental sanity and insanity. New theories have been broached, and various grades and species of mania have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs. Whatever difference of opinion there may be as to the construction and operation of the mind of man, whatever difficulty in discovering the various degrees of unsoundness, it is only necessary for us to ascertain the kind of prostration which is requisite to free a man from punishment for crimes by the law of the land. It is with this alone we have to do. What the law has said, we say. In all things else we are silent. We put our feet in the tracks of our forefathers. Non mene hic sermo, sed quæ præcepit ofFellus. Let us then, for a moment, resort to the sages of the law of different ages and learn from them whether that species of frenzy which is produced by inebriety constitutes any excuse for crime, and what sort of insanity it is which will serve this purpose."

After reviewing the English authorities, the court proceeds as follows: "In the above extracts we see the law in this respect. A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend of virtue, peace, quietness, and good government. The history of criminals and criminal trials shows that he who has not learned betimes to restrain the evil inclinations of our nature—envy, malice, revenge, and their kind—but has a sufficiency of moral sense left to deter him from the

commission of enormity while sober, will often 'screw his courage
280 to the sticking point' by the free use of ardent spirits, and, thus made able to silence the twinges of his conscience, will voluntarily imitate the demon. But let the courts approve the doctrine now contended for, and it will not be resorted to as a plea by persons of this description alone; but even the cold-blooded, calculating assassin will never be a sober homicide; he will always exhibit himself at the bar of a court of justice as a specimen of insanity, produced by drunkenness. And thus this degrading and disgraceful, yet too common, vice, instead of being hooted from society, as the bane of good morals and social and domestic happiness, will be converted into a shield to protect from punishment the worst of crimes. All civilized governments must punish the culprit who relies on so untenable a defence; and in so doing they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents and to guardians, and to youth, and to society, 'than comes in the cold abstract from pulpits.'

"In order to be clearly understood we have supposed the strongest case, a case of entire prostration of intellect immediately occasioned by drunkenness, and have said that that constitutes no excuse. Instances, however, of he*ni*ous offences committed under such circumstances are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober.

281 "Another case on this subject often quoted and cited is Choice v. State, 31 Ga., 424 (decided in 1860, quoted approvingly in Goodwin v. State, 96 Ind., 550, 579), the opinion being delivered by Chief Justice Lumpkin, that legal luminary of the South. He said, 'Whether any one is born with an irresistible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capitally doubt whether it can ever be. And if it were, how far this crazy desire for liquor would excuse from crime it is not for me to say. That this controlling thirst for liquor may be acquired by the force of habit, until it becomes a sort of a second nature, in common language, I entertain no doubt. Whether even a long course o indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immutably, and from it nothing can dislodge me but an act of the legislature, namely: that neither moral nor legal responsibility can be avoided in that way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more nor less than this: that a want of will and conscience to do right will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrongdoing. If this doctrine be true—I speak it with all seriousness—the devil is the most irresponsible being in the universe. For, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder

until it is as hard for an Ethopian to change his skin as for them to cease to do evil; but the inability of Satan to control his will to do right
282 is far beyond that; and yet our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison-house of God's enemies. The fact is, responsibility depends upon the possession of will, not the power over it.'

If a man destroys his power over his will, if he still has will he is responsible.

"Nor does the most desperate drunkard lose power to control his will, but he loses the desire to control it. No matter how deep his degredation, the drunkard uses his will when he takes his cup. It is for the pleasure of the relief of the draught that he takes it. His intellect, his appetite, and his will all work rationally, if not wisely, in his guilty indulgence, and were you to exonerate the inebriate from responsibility you would do violence both to his consciousness and to his conscience, for he not only feels the self-prompted use of every rational power involved in accountability, but he feels, also, precisely what this new philosopy denies, his solemn and actual wrongdoing in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, just compose him so as to reach his clear, constant experience, and he will confess that he realizes his guilt, and therefore the responsibility of his conduct. A creature made responsible by God never loses his responsibility save by some sort of insanity. There have always existed amongst men a variety of cases wherein the will of the transgressor is universally admitted to have little or no power to dictate a return to virtue. But mankind have never, in any age of the world, exonerated the party from responsibility, except when considered to have lost rectitude of intellect by direct mental ab*b*erration."

283 Again, reading from the case of People v. Ferris, from the State of California.

"No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in such a condition." The fact of intoxication alone, as it is declared by a well-settled rule of law, is no excuse for the commission of a crime. "Insanity produced by intoxication does not destroy responsibility, when the party, when sane and responsible, made himself voluntarily intoxicated. And drunkenness forms no defence whatever to the fact of guilt; for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution."

You will learn presently how far it can be considered for the purpose of reducing the grade of the crime.

"Insanity in a legal sense"——

I am calling your attention to what insanity is, that you may know that all outside of it is a condition of mind, a mental condition, where people are held to a certain degree of responsibility. If they are insane, if the faculties of the mind are broken down, destroyed by drink, or from any

other cause, so they come under the head of insanity as defined by the law, then they are not responsible for any act they may do——

"and that sort of condition as applicable to crime is a diseased mind, producing such a mental condition that the accused is incapable of
284 distinguishing between right and wrong, and from knowing right from wrong with reference to that particular act. If he was conscious of what he was about, if he knew what he was doing at the time, if he knew his conduct and actions at the time, then there was in it consciousness that would take his condition outside of the condition of insanity. There is no insanity in that sort of condition, because when a man is insane with reference to the act he is doing he is a mere automaton, he hasn't any consciousness of it—he has not that consciousness that would enable him to look at it, judge of it, or kn'w what condition he was in, and what he was doing.

"While intoxication per se is no defence to the fact of guilt, yet when the question of intent or premeditation is concerned, evidence of i is admissible for the purpose of determining the precise degree. 'Great caution,' Mr. Wharton says, 'is undoubtedly necessary in the application of this doctrine; for, as has already been remarked, there are few cases of premeditated violent homicide in which the defendant does not previously nerve himself for the encounter by liquor, and there would in future be none at all if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation aliunde, and where the defendant is proved at the time of the occurrence to be in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life, or that there was no positive premeditation.'

285 "To disprove *malice*, voluntary immediate drunkenness is irrelevant."

It can not be used for that purpose.

It is stated in Hopt v. People (104 U. S., 631) that—

"At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. [Citing authorities.] But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

It can not be taken into account for the purpose of showing absence of premeditation if the proof, and the whole proof, sh'ws the doing of a deliberate act—that is to say, an act growing out of a purpose that the party had in view at the time, such, in this case, as a desire of the defendant to get into the house of the deceased woman, Lulu May. If the statement of the defendant himself, that he did know what he was doing, is true, and he intentionally drew the pistol, presented it, and fired it so as to take the life of this woman, that would not be a state of case where there would be that absence of that premeditation which goes to make malice aforethought. If

he was in a condition of mind at the time that he was so acting that his mind was so disturbed by drinking, by a drunken condition, that he was incapacitated so that he was incapable of forming any intent, or intent to do a wrongful act that might result in death, that may be taken
286 into account for the purpose of showing a state of case where the crime would be of less grade than that of murder; but, in the language of the law I have read to you, great caution is to be used by the jury in making an application of this principle, because voluntary intoxication, although it may inflame the mind of the party, although it may excite the mind of the party, although it may prompt him the more readily, the more quickly, to do a reckless or wanton act, if it is in a state of case where he has deliberation of purpose, where he has premeditation of purpose enough to draw and present and fire a deadly weapon, which results in the taking of a life of another, intoxication in such a condition as that is not a mitigating fact, unless that intoxication goes to the extent to put the mind in the condition that the mind of a man was put in in this State where he was excused under the law declared by the supreme court, on the ground of intoxication, where the evidence showed that he had been in the habit of going into the law office of another lawyer (he being a lawyer himself), he being a man who was constantly drunk, and being in the habit of picking up in this other's office things there, and one day he picked up a pistol, and his mind was so far confused by liquor that he could not form an intent, could not discriminate as to whether it was his property or that of some one else, and he was excused, because he could not form an intent to commit the crime of larceny; and that is the test. When a man's mind is in a condition where he can form an intent to do a wrongful act that may result in murder, and he does deliberately form that intent, as evidenced by the drawing and presenting and fir-
287 ing his pistol, then intoxication does not mitigate his offense; if he is carried beyond that, although he may not be absolutely insane so his will power is gone, so he has no control over it, so that he can not restrain it, while he may not be insane, then there is an absence from the case of what is denominated by law as malice aforethought, and his offense would be manslaughter.

Now, gentlemen of the jury, I have given you the law showing what figure drunkenness cuts in a case, and it is for you to make such application of the law as will be appropriate. You are not to excuse him to the extent of mitigating his crime because he was drunk, unless he was in that condition where he was incapable of forming an intent, where he was incapable of coming to a conclusion—and it does not mean alone incapable of forming a specific intent to kill, but it means incapable of forming a specific intent to do an act that may kill, that goes so far as to reduce the grade of the crime. If he could not form a specific intent to do the act he did do, then that would reduce the grade of the crime because of drunkenness; but if he was conscious of his condition, as he says he was, if his words are to be taken as true as he gives them when on the stand in that respect, if he had the degree of consciousness that he says he had by his evidence, you have a right to take into consideration his drunkenness, not for the purpose of reducing the grade of the crime, but for the purpose of showing the surrounding facts and circumstances attending that act of killing.

Now, the question recurs as to whether or not he was a participant in that act—whether he did the killing. You have the evidence before you upon that subject. As was well remarked by Mr.
288 Mellette, the assistant district attorney, in his argument, it is not expected in these cases of murder that the Government can select the witnesses that are to be produced before you to prove the killing or to prove the locality of the killing, and the wheels of justice are not to stop because we can not get men of the highest morality or women of the greatest virtue to testify to these facts. These people are competent witnesses, and their evidence is to be taken by the jury and weighed in the light and by the aid of these reasonable rules that are given you to weigh the testimony of all witnesses; and above all things, when you enter upon an analysis of the testimony of witnesses, you are to bring to bear your experience upon that evidence, your observation in life; you are to look at its reasonableness, see how it is corroborated by extraneous, inanimate facts in the shape of circumstances, which can not be influenced by any motive or any consideration, though when they are produced before you in a proper way, when they come before you as inanimate things, they sometimes speak with wondrous power. They not only speak so as to prove facts independently and by themselves, but they go to corroborate that which is posivive in its character if that positive evidence is true, and they go to contradict that which is offered as positive evidence but which may be false. There is one immutable law that is as eternal and everlasting as God himself, and it is so because it comes from Him, which is that all parts of the truth are harmonious substantially; they harmonize, and those parts of the truth are harmonious and consistent and the same at all times. The fact that was a fact yesterday is a fact to-day; a truth that was a truth on the 15th night of October, 1892, when this killing
289 is alleged to have occurred, is a fact at this hour, and it will always remain a truth. And that fact, that truth, is harmonious and consistent with every other truth that may be pertinent to this case. This is one of the great tests in the hands and in the minds of intelligent men, to enable them to get at the truth of a case. There is not a case occurring here, as you observe, or scarcely one that has been tried since you have been serving here as jurors this term, where there was not in that case a sharp, decisive, and distinct conflict in the testimony, which indicated willful and corrupt perjury upon one side or the other. It shows what depths, what heights, and what breadths of degradation we have amongst us, when court-houses are daily and hourly polluted by this stream of perjury and corruption that is injected into the trials that transpire in courts of justice. This is a matter of common observation that you have noticed. This conflict exists in this case. There is such a conflict between the statements of facts as truths in this case as that you can not reconcile them, except upon the theory that somebody has deliberately committed perjury. That is one of the difficult problems you have to solve in these trials. It is your duty to search for the truth, to fasten your faith to the truth, to place your conviction upon the truth, and to do that you must search for it, no matter what the labor, no matter what the mental labor required, until you have exhausted every effort to obtain it. You look at the evidence in the light of its reasonableness, in the light of its probability; and in the light of its consistency. You have a right, and it is your duty,

to take into consideration the character of the witnesses from whom
290 it comes. The law says that these women, who are admittedly women who lack virtue, women who are living a life of shame, are competent witnesses. The matter is left to the jury, to weigh their evidence by the light of the law upon the contemplation and upon the theory that the jury are competent by the light of these reasonable rules I have given you to ascertain whether they are telling the truth or not. But in a case of that kind, above all other cases, it is your duty to see whether their testimony is reasonable, whether it is probable, whether it is consistent, and whether it is supported by other evidence.

For example, you take the statements of these two women as to the happening of this occurrence; you inquire right at that point who was it that was seeking to get into that house; what his business was there, if you can find that out—presumably we know what it was from the evidence—what effort he made to get in there; whether he was expressing any degree of impatience because the door was not opened, while under the influence of liquor; whether he became angry because that was not opened—in other words, what was his relation to the woman who had control of that house; was it different from the relations of anybody else; was it more intimate in a certain direction—that is, was he prompted by a design then and there to compel the opening of that house; if so, you have a fact that you have a right to take into consideration in connection with the statements of these two women as to that occurrence. Then you go to the testimony of the two Miss Wilsons; they were not people who were at that house; they are not that kind of people, evidently; they are virtuous girls, coming before you with their characters untarnished in every respect. They tell you this defendant admitted to them the shooting; they gave you that as their testimony. If he made that ad-
291 mission to them, that becomes a fact corroborating the statements as to this occurrence as detailed by these other witnesses. It is your duty, it is your right, and the law commands you to start at the place of this killing and travel in every direction from that point where you may find evidence that throws any light on the manner of the killing. These admissions made under the circumstances to these young girls; made to persons who from their testimony were friendly to the defendant—at least, not his enemies—are to be taken into consideration by you.

The statement is made in argument here that they have a motive because of the relation of their brother to this case. You are to take that into consideration. It is your duty to see what the relation of this brother was; it is your duty to see what his relation to the transaction was; it is your duty to see what his conduct subsequent thereto was; it is your duty to see whether the facts and circumstances in this case are given to you in such a way as that you can depend upon them, corroborating his testimony in the matter, confirming what he says. All of these facts are to be taken into consideration by you. You are to take all the accusatory facts that are offered here; you are to see what state of case they establish. If they make a case that goes beyond a reasonable doubt, your duty then is to take a step forward to see what facts are offered here by way of excuse, or by way of explanation, or by way of exoneration, or by way of showing nonparticipation upon the part of this defendant in that act. In doing that it is your duty to take into consideration the character of the facts here.

There appear before you witnesses who testify to what are known as impeaching facts; they go before you, both facts and circumstances,
292 as ex post facto facts—the testimony outside of the defendant—that is, facts that have occurred, as it is claimed, after the killing and since the killing.

Now, it is your duty to look at the very appearance of a witness who may come before you. You have a right to take into consideration the very conduct of the witness upon the stand when giving evidence before you. In looking at the testimony of this witness, George Maxey, you have to see whether or not his statements are reasonable, are true, in the light of his previous conduct in connection with this matter; whether it would be natural and reasonable, if he saw what he did, when the defendant was accused, when he had been examined before the commissioner, when he had been bound over and indicted, when he was in jail, if he would have kept concealed these facts for the reasons he has given. These things are to be taken into consideration by you, and the very fact of his being kept in concealment, kept here hid away, as he says he was, kept beyond the reach of investigation or knowledge of anybody, is a fact as it has gone before you by the testimony that you are to take into account, because it is out of the usual method of dealing with matters where the truth is in the mouth of a witness. It is your duty to take it into consideration. It is your province to look at his actions upon the stand. It is your province to take into consideration his whole conduct in connection with this matter, to see whether or not he is telling the truth. If he is telling the truth the other witnesses are necessarily telling that which is false. And I repeat it is highly important that you should look at this inanimate evidence
293 as to the manner of the shooting as shown by the powder-burn upon that door, if you find that to exist. In viewing the testimony of the witness Maxey, I say, you are to take into consideration the method of his production into this court-house, and into this case, and all of these things, to enable you to get at whether he has told the truth or not. You have other contradictory witnesses.

You have the testimony of Steve Farrel, who, the proof shows, stands under a charge of incest, who says that while in the jail he heard a statement made by the witness, Wilson, inconsistent with the statement made by Wilson on the stand. That is an ex post facto fact, a fact occurring after the killing. You have also the witness, Charles Hankins, a man who has been convicted and sentenced for the crime of manslaughter, defended by the counsel who defended this defendant in this case, and, as he tells you, he comes from the jail; he undertakes to give you a statement, and you are to view his statement in the light of the principle that exists in the heart of a man that when he is placed by the law and by a verdict of a jury by his conviction upon the side of the criminal classes, or among the criminal classes, that his sympathies are usually with the criminal, and in viewing his statement you are to consider his condition; you are to consider the evidence he undertakes to give you, how he tells you he obtained it, and how he come to be a witness here. Then you have the statement of other contradictory witnesses. And I want to say to you, in accordance with the universal practice adopted from necessity recently by this court, that I desire to specially admonish you against the testimony of men who sneak around this building as spies upon witnesses, of men who follow and keep after Govern-

ment witnesses for the purpose of fishing out of them facts that may be
294 used in criminal trials here. It is a common practice in desperate cases where men who can be found, if they are so insignificant as to engage in such miserable, contemptible practice—it is a common thing, I say, to resort to such testimony; and before you believe the testimony of Andrew Hendricks and Earl Mattison you are to look at it with reference to the method that they obtained it; to find out if you can what their motive was that they should follow these women around to fish something out of them, that they might come into this court-house and give it before you as evidence. These witnesses are ex post facto witnesses; they are men who manifestly, from their own statements, who had some motive for fishing out facts here that might impeach the statements of these women. It is a method of the administration of justice that is reprehensible, that is disgraceful, to all who are engaged in it, and wherever it occurs, in the court-house, in the yard, or in the town, as an ex post facto transaction it should be marked with reprobation by the jury so far as to disbelieve it, unless they believe it is sustained by other facts and circumstances that would give it credibility aside from coming from a source of that despicable character. I measure well the words I utter. I know the methods sometimes resorted to in and about this court-house. I know what is resorted to here, and I warn you that the testimony of these men is to receive that scrutiny, that examination, that deliberate judgment, that will enable you, in the light of their relation to this case and to these witnesses, to see whether it is true before you believe it. I ask
you to take it into consideration particular care, and to use the
295 greatest discrimination, the highest judgment, and the utmost deliberation, in passing upon the testimony of Andrew Hendricks, Earl Mattison, Charles Hankins, Steve Farrel, and George Maxey. They all come here and contradict a state of case set out by the application of the defendant himself for witnesses, as solemnly prepared by his counsel and as understood and solemnly sworn to by himself and it is your duty in the administration of justice, no matter who it hurts, no matter who it affects, to see what the solemn truth is, and to promulgate that principle of the law that is applicable to that truth; and in doing so if you find that false means have been resorted to, if you find that perjury has been invoked deliberately and intentionally, the law says to you that you are to take that into account as an evidence of the weakness of the case of the party who invokes that perjury. That is one thing that you can avail yourself of. Whenever you discover the use of perjury willfully and intentionally, it is your duty to consider that the cause that willfully invokes that perjury is a cause that can not depend on the truth, as a rule. Of course weak men, unthinking men, may resort to that method when they have the truth on their side, but it is not the rule. The rule is that if a man has the truth in his favor he will avail himself of it; the rule is that if a man has the truth it exists with him at the time of the act as well as afterwards; and the rule is that he will depend upon that truth, because it is his best friend, because it will shield and protect him; but if he has not the truth the best he can do is to rely upon that which is false.

Now, then, I ask you to look at this evidence. I ask you to look at it in the light of its reasonableness. I ask you to look at it in the light
296 of its probability. I ask you to look at it in the light of its consistency. I ask you to say what is true and what is false in this case, and I ask you to fasten your faith upon that which is true.

You take the statement of the defendant who has gone on the stand. He is in a position where he has the highest motive confronting him that a man can have in this life to make statements favorable to himself. There is no use of disregarding that fact; it is so with any of us, and we are to view the statements of such a witness in the light of their consistency and reasonableness, and probability, and in the light of his attitude to the case, and in the light of other facts that are truthful and that can be depended upon as truthful in the case. If he is sustained by such facts he is strengthened. If he is contradicted by such facts he is weakened as you attach credit to the contradicting facts. You look at his evidence, then, in the light of his motive in the case, and in the light of the other facts and circumstances, in the light of the other testimony.

I ask you to give to this evidence, and the whole of it, that discrimination, that good judgment, and that deliberation that will enable you to say whether it is true or false, and what is true and what is false. There is truth here, and there is falsehood here. Somebody is telling that which is true and somebody is telling that which is false. You are to separate the true from the false. You are to discard that which is false, drive that out of the case as having no existence in it, and fasten your faith to the truth. If that truth carries the case to that point where you can say as reasonable men in the light of the law defining these crimes, in the light of the evidence that you find
297 to be true in this case, that the charge of murder is made out beyond reasonable doubt, your duty is to convict of murder, no matter what the consequences. You have nothing to do with the consequences. You have nothing to do with how it may affect anybody. You are above that; no consideration of that kind should ever enter the mind of any honest juror. It is the law and the truth that is relevant to the case that is to govern you, and whenever the truth carries your minds to a point where you are able to say that you have an abiding conviction to a moral certainty of the truth of the charge, or that it is proven to the degree of certainty that, as a citizen, if the same state of facts, if the same witnesses, if the same circumstances, were brought before you as such citizens, and after you had deliberated so far on the law defining the crime when it had been given to you, that you would say in your inner conscience, in your honest minds, that you believe that that woman was killed, that she was killed in the way described in the indictment, that she was killed by the defendant, that she was killed in such a way as that, under the law, the act was willful, and done with malice aforethought, I say, if these respective requisites of the law are established to that extent, your duty is to convict of murder. If you can find there was that condition of intoxication that put his mind in the shape, or in the attitude, or in the condition where he was not conscious of the act, or not conscious of any act he was doing, not capable of forming a deliberate intent to do a wrongful act that might result in death, then your duty would be to find him guilty of man-

slaughter. But you are not to find him guilty of manslaughter if you find the crime of murder has been committed, by way of a
298 compromise with crime. The law recognizes no compromises with crime. It says to the jury to take the evidence, see what it shows, take the law defining these crimes, and apply the principle that is appropriate to that condition. On the contrary, if the case is not carried to that point where you as citizens, applying these rules I have given you, would be satisfied beyond a reasonable doubt that the charge was proven, and that it was proven to that degree of certainty you would believe and act upon it, then it is in a state of reasonable doubt and your duty would be to acquaint upon that ground. That does not mean you are to act upon any doubt, surmise, or conjecture, but it means you can alone act upon a real substantial doubt of guilt, not upon a mere conjecture as to a possibility of innocence.

Gentlemen, I submit this case to you; if you find the law has been violated here I ask you to vindicate it by a verdict that is appropriate. If you find it has not been violated by this defendant, I ask you to vindicate the defendant. You will consider the evidence fully and completely. You are to take into consideration with care and with deliberation the law defining these crimes as the court has given it to you, and do the equal and exact justice I know you are capable of doing, and that I know you all have the desire to do.

You will take the case and make up your verdict.

5:15 p. m.

Verdict, guilty of murder.

299 To which the defendant at the time objected:

1st. Because the court erred in refusing to instruct the jury, as requested by the defendant, as follows:

"If the jury believes from the evidence that the defendant was at the time of the killing of Lula May drunk, and that before becoming drunk he entertained no malice toward her and had no intention to take her life, and that his intoxication was so deep as to render the formation of any specific intent to take life impossible on his part, he could not be convicted of murder."

This request to charge was refused because the law had been correctly given on the subject of drunkenness.

To which refusal of the court to so instruct the jury the defendant at the time excepted.

2nd. Because the court erred in instructing the jury as follows:

"That where the door of a dwelling house is fired into and an inmate killed, this is murder, whether the party intended to kill or not."

3rd. Because the court erred in instructing the jury that "the deliberate use of a deadly weapon shows premeditation, thought of before hand, and shows malice and a purpose to do a wrongful act."

4th. Because the court erred in instructing the jury that "malice is presumed from the act of firing into a dwelling-house."

5th. Because the court erred in commenting to the jury and urging them as good citizens to perform their duty, and in commenting upon the enormity of the crime of murder and the frequency with which it is committed in the Indian Territory.

300 6th. Because the court erred in instructing the jury as to the law of murder and as to malice in murder.

7th. Because the court erred as to the definition of manslaughter and in stating to the jury that "the only condition that would produce manslaughter or justify a conclusion of manslaughter in this case would be such a state of intoxication on the part of defendant as would render him incapable of forming any specific intent to take life."

8th. Because the court erred in instructing the jury as to the law of intoxication and the effect of it upon the act of the defendant.

9th. Because the court erred, to the prejudice of the defendant, in commenting unfavorably upon the testimony of the defendant's witnesses who were uncontradicted and unimpeached, and in failing to comment upon the testimony of the Government's witnesses who were contradicted and impeached. And in saying to the jury, in commenting upon the testimony of the witness, George Maxey, "You are to see whether this witness was subpœnaed in the usual way, at the expense of the Government; you are to see whether he is at the expense of the Government; you are to see whether he is an ex post facto witness; you are to see and find out whether he is a nunc pro tunc witness." And in saying to the jury that, "the witnesses, Maxey, Madison, Hendrix, Farrell, and Hankins, are swearing to a state of case contradicting the solemn sworn statement of the defendant in his application for witnesses." And in unfavorably commenting upon the testimony of the said witnesses when they were not contradicted or impeached.

301 After argument of counsel the jury, after deliberation, returned into court the following verdict:

We, the jury, find the defendant guilty of murder as charged in the within indictment.

(Signed) I. T. STRINGFIELD, *Foreman.*

And thereupon the defendant filed his motion for a new trial in words and figures following:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
MARSHALL TUCKER. } Murder.

The defendant, Marshall Tucker, moves the court to set aside the verdict of the jury in this case and grant him a new trial for the following reasons:

1. Because the court erred in admitting to be read in evidence by the prosecution the application made by the defendant for witnesses.

2. Because the court erred in admitting incompetent testimony to go to the jury on the part of the prosecution.

3. Because the court erred in refusing to instruct the jury as requested by the defendant.

4. Because the court erred in instructing the jury that where the door of a dwelling house is fired into and an inmate is killed, this is murder, whether the party intended to kill or not.

5. Because the court erred in instructing the jury that malice is presumed from the act of firing into a dwelling house.

6. Because the court erred in instructing the jury that the deliberate use of a deadly weapon shows premeditation, thought of beforehand, and shows malice and a purpose to do a wrongful act.

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7. Because the court erred in commenting to the jury, and urging them as good citizens to perform their duty, and in commenting upon the enormity of the crime of murder and the frequency with which it is committed in the Indian Territory.

8. Because the court erred in instructing the jury as to the law of murder and as to malice in murder.

9. Because the court erred as to the definition of manslaughter, and in stating to the jury that the only condition that would produce manslaughter, or justify conclusion of manslaughter in this case would be such a state of intoxication on the part of the defendant as would render him incapable of forming any specific intent to take life.

10. Because the court erred in instructing the jury as to the law of intoxication and the effect of it upon the act of the defendant.

11. Because the court erred to the prejudice of the defendant in commenting unfavorably upon the testimony of the defendant's witnesses, who were uncontradicted and unimpeached, and in failing to comment upon the testimony of the Government witnesses who were contradicted and impeached, and in saying to the jury in commenting upon the testimony of the witness George Maxey, and saying to the jury, "You are to see whether this witness was subpœnaed in the usual way at the expense of the Government; you are to see whether he is an ex post fact witness; you are to see and find out whether he is a nunc pro tunc witness." And in saying to the jury that the witnesses Maxey, Mattison, Hendrix, Farrel, and Hankins, "are swearing to a state of case contradicting the solemn, sworn statement of the defendant in his application for witnesses," and in unfavorably commenting upon the testimony of the said witnesses when they were not impeached or contradicted.

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12. Because the court erred to the prejudice of the defendant in directing Deputy Marshal White to arrest the witness, George Maxey, before he left the witness stand, and in having him arrested by said White as he went out of the door of the court room and taken off to jail in the presence of the jury.

13. Because of newly-discovered testimony, which is shown by the affidavit, which is herewith filed and made a part of this motion, of J. D. Gunn, whose testimony was discovered after the trial of the cause began and too late to procure his presence at the trial until after the argument of the case had commenced.

WM. M. CRAVENS,
J. B. FORRESTER,
Attys. for Deft.

(Endorsed on back:) Filed Mch. 20, 1893. S. Wheeler, clk., by I. M. Dodge, D. C.

In support of his motion for a new trial the defendant filed the affidavits of himself and J. D. Gunn, in words and figures following:

In the United States circuit court for the western district of Arkansas.

THE UNITED STATES }
against
MARSHALL TUCKER. }

On the 17th day of March, 1893, personally appeared before me, C. M. Cooke, a notary public within and for the county of Sebastian, State of Arkansas, John Gunn, who, being duly sworn according to law, says:

304 That he was, on the evening of the 10th day of March, 1893, about 4 o'clock, subpœnaed as a witness for the defendant in the above-entitled cause at Hackett City, Sebastian County, Arks.; and by the earliest route arrived in the city of Fort Smith, about 6:30 o'clock p. m., on the St. Louis & San Francisco Railway, and at 8:30 o'clock next morning, being Saturday, March 11th, he reported as a witness, when the argument in the case was progressing; that as soon as was convenient, and after the argument for the Government had begun, he notified counsel for the defense of his presence; that he did not testify in said cause, and that if he had his testimony would have been:

I was at McAlester at the time the deceased was shot; I knew the deceased; I had been to Vernon, Texas, and was just returning from that place; I had stopped at McAlester over night, taking supper at hotel at the left of railway; after I had eaten supper I started to see Lula Mays; I had met her before at Ft. Smith; I was a stranger at McAlester; never was there before nor since; I employed a colored man to show me the place where Lula lived; on our way to the place where the alleged killing occurred there were two men behind me; they seemed to be very boisterous; I went on over to where the alleged killing occurred—chippy house; I wanted to see where these boisterous people were going; did not want to go to the chippy house if they went there, as I did not desire to be in such company as they seemed to be; I stepped out to one side behind some black-jack trees, some thirty or forty yards away from the chippy house; I then watched to see if they would go on or stop at the chippy house; they came to the place where I had started; I

305 was behind them at that time and to the right; one of them made a threat to kick the door down and was beating on the door with something that sounded like his fist; I was still standing in my position; I thought from the conversation that a compromise was made to let them in; I then started to turn around and go back up to town, and suddenly, to my surprise, there was a crack of a gun which flashed behind the parties at the door and some thirty or forty yards behind them; when the gun fired I could see very plainly that it was a gun from behind these parties at the door, or near the door, that fired the shot; I was about 40 or 50 yards from where the shot was fired; this was the only shot that was fired while I was there; these men had not left the door when I left the place; a woman had thrown the door open and said "Marshal, you have shot Lula;" I know it was not the men at the door that fired the shot; it was my impression at the time that it was some one trying to kill

the persons at the door; having seen the fire of the pistol, or rather the blaze of the pistol, from behind the men at the door, I can state positively that the men at the door did not fire the shot; I am not akin or interested in the defendant; I am a traveling insurance man, and make this statement as a matter of justice.

J. D. GUNN.

Sworn to and subscribed before me this 20th day of March, A. D. 1893.

C. M. COOKE,
Notary Public.

My commission expires March 19, 1894.

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Endorsed on back:) Filed Apr. 15, 1893.

306 In the circuit court of the United States for the western district of Arkansas.

THE UNITED STATES
vs.
MARSHALL TUCKER.

The defendant, Marshal Tucker, says that he has been in confinement as a prisoner and in the United States jail at Fort Smith, Arkansas, since the killing of Lula Mays, and has had no opportunity to make any investigation of the facts within the knowledge of witnesses that might be material in his case, and that he was not informed and knew nothing of the fact that J. D. Gunn was at the place of the killing until after his trial commenced, and then he learned it through information from others and not directly from said Gunn; and he at once, on being informed, took steps to get said Gunn here, but he did not come to this town or to the court until after the argument of the case before the jury had commenced and his testimony was excluded on that account.

M. N. TUCKER.

Sworn to and subscribed to before me this 15th day of May, 1893.

STEPHEN WHEELER, *Clerk,*
By I. M. DODGE, *D. C.*

(Endorsed on back:) Filed April 15, 1893. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

Attached to and filed with motion for new trial. And thereupon the court overruled said motion and pronounced the sentence of death upon the defendant, and in overruling said motion the court made the following remarks:

307 UNITED STATES
vs.
MARSHAL TUCKER.

It becomes highly necessary in this case that the many causes set out in the motion for a new trial should be examined in detail.

The first cause is, because the court erred in admitting to be read in evidence by the prosecution the application made by the defendant for witnesses.

It is claimed under section 860 of the Revised Statutes of the U. S. that this application for witnesses should not have been admitted as evidence in the case. Said section is as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture." * * *

This affidavit is not a pleading, in the sense of the word used in the statute, nor is it a discovery such as is there meant, for the word as used in the statute means a discovery as recognized in equity practice, to wit: "The disclosure by the defendant of matters important to enable the plaintiff to maintain his rights." It does not mean "Evidence obtained from a party or witness by means of judicial proceeding in this or any foreign country" in the sense of that term as used in the statute. Therefore, I do not think the introduction of the affidavit filed this case to obtain witnesses is prohibited by section 860 of
308 the Revised Statutes of the United States. But in a case like this, where the defendant swears on the stand he was not so intoxicated as to be seriously affected, it may be introduced in rebuttal as a contradicting fact to show he swore in his application for witnesses that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing, and was incapable of forming any intent or design. This simply presents a state of case where the defendant in the same case swears differently at different times, and one statement contradicts the other. There was no error in the admission of this paper, no more than there would have been by admitting proof of any other contradictory statements made by the defendant in regard to the killing, or his condition at the time after he had gone on the stand as a witness. He then becomes liable to contradiction by showing he made statements in the same case at another time different from these he made on the stand. The rule contended for would prohibit the contradiction of the defendant as a witness by showing he had given evidence before the commissoner different from what he gave on the stand. Surely this was not intended by the section of the law above named.

The second cause for a new trial is, "Because the court erred in admitting incompetent testimony to go to the jury on the part of the prosecution." I, of course, do not know what is meant by this cause, as nothing is pointed out, and I can not therefore notice the same, but I take it for granted that on reflection nothing was found that was in this particular erroneous, or that counsel would have specified it.

The third cause is, "Because the court erred in refusing to instruct the jury as requested by the defendant."

309 The request to charge the jury was as follows:

If the jury believe from the evidence that the defendant was, at the time of the killing of Lulu May, drunk, and that before becoming drunk he entertained no malice towards her, and had no intent to take

her life, and that his intoxication was so deep as to render the formation of any specific intent to take life impossible on his part, he could not be convicted of murder.

On an examination of the charge it will be found that the law was fully, and, as I believe, correctly given on the subject of drunkenness, and it in substance contains the proposition as requested to be given, and it would but tend to produce confusion to have repeated it. I do not think there was any error in this regard.

The fourth cause is, because the court erred in instruction the jury that where the door of the dwelling house is fired into, and an inmate is killed, this is murder, whether the party intended to kill or not.

It is sufficient answer to this cause that the court did not charge the jury in the way set out by the defendant. I will read what I did charge on that point:

Speaking of the necessity of finding whether the act of killing was willfully done, the court said it was necessary to find whether this element exists in this case or not. If you find that the pistol used was presented and fired in such a way as to take the life of Lulu May, or that it might probably or naturally or reasonably do that, you have a right, and it is your duty, to come to the necessary conclusion, in the language of the law that I have read to you, that it was the intent of the party who fired
310 that weapon to inflict whatever consequence might naturally or reasonably or probably follow from the doing of an act in that way. Now, it is not necessary to create this state of case that the party should have in range with his eye the object at which he shot with the deadly weapon, for if it is a known fact that persons are in a dwelling house and a party shoots into the door of it, that is the place where they have a right to be; it is their castle; no one has a right to improperly or against the will of the occupant to invade it, except for a lawful purpose, and if there is brought to the attention of the party that there are persons in the house, as it is by the fact of the knowledge upon his part that the house is inhabited, and as it may be again brought to his attention from voices on the inside, or from persons speaking on the inside, that persons are there, he shooting into the door of that house, willfully and intentionally, is the doing of a dangerous and reckless and wicked and wanton act upon the part of he who does it, and an act, too, from which we have a right to infer that it was one that might possibly or naturally or reasonably inflict deadly danger upon those on the inside. And consequently, under the law, if a man goes to another's place and shoots into it at night, or in the daytime, if you please, if he shoots into the house, as in this case through the door, from the fact it is inhabitated, that it is occupied, he is required to stay his dangerous and wicked hand from an act of that character, and if he does not hit anybody on the inside, under the law he is guilty with an assault with an intent to kill inflicted upon each and every one of the inmates of that house who may be in there at that time.

This is very different from saying that where the door of the
311 dwelling house was fired into and an inmate is killed this is murder, whether the party intended to kill or not. The assertion of the last proposition would make it murder, though it might be an accident. The assertion of the proposition contained in the charge fully shows what character of act in the shape of intentionally shooting into a dwelling house would prove intent, and consequent willfulness.

The fifth cause is, because the court erred in instructing the jury that malice is presumed from the act of firing into a dwelling house.

Sufficient answer to this is that no such proposition was given to the jury. It arises from a misapprehension of what the charge on this point was. I do not think there was any error upon the part of the court in telling the jury what facts they might take into consideration in finding the existence of malice aforethought, and it is but necessary to refer to the charge to find that the proposition, as asserted in the fifth cause, for a new trial was an entire mistake.

The sixth cause is, because the court erred in instructing the jury that the deliberate use of a deadly weapon shows premeditation, thought of beforehand, and shows malice and a purpose to do a wrongful act.

The charge nowhere contains a proposition of this kind, but it does, in substance, declare that the deliberate selection and use of a deadly weapon in a deadly way without just cause, or in the absence of mitigating facts, shows premeditation, thought of beforehand, and malice aforethought.

The seventh cause is, because the court erred in commenting to
312 the jury, and urging them as good citizens to perform their duty, and in commenting upon the enormity of the crime of murder, and the frequency with which it is committed in the Indian Territory.

The only answer needed to this cause is that, as set out, the charge contains nowhere any such proposition. It seems to be a shot in the air with the hope that it might hit something.

The eight' cause is, because the court erred in instructing the jury as to the law of murder, and as to malice in murder. I am unable to know what is meant by this cause, as it does not state in what particular the court erred in instructing as to the law of murder, and as to malice aforethought. I believe the charge will show that malice aforethought was correctly defined, and that murder was defined as the law defines it.

The ninth cause is, because the court erred as to the definition of manslaughter, and in ststing to the jury that the only condition that would produce manslaughter, or justify a conclusion of manslaughter in this case, would be such a state of intoxication on the part of the defendant as would render him incapable of forming any specific intent to take life.

I think we have but to refer to section 5341, Revised Statutes of the U. S., to find that the charge correctly define' manslaughter. It says it means the unlawful and willful killing of a person without malice aforethought. So does the charge define the crime of manslaughter in this way, but it is complained because the court told the jury that the only condition in which manslaughter could exist in this case would be such a condition of intoxication on the part of the defendant as would render him incapable of form-
313 ing any specific intent to take life. When a man hears the voice of a woman in the house, is talking to her and quarreling at her because she will not open her door, and shoots into the door and kills her, tell me what will so far mitigate an act of this kind as to make it manslaughter but such intoxication as to render him incapable of forming any specific intent. Surely the party killed under such circumstances has done nothing to mitigate the crime. If this is not the law the dwelling is the most unsafe place a person can be; for if a party, without any cause, and without any specific intent to kill a particular person, shoots so as to endanger life in the street or on the public highway and kills, he is guilty

of murder, if such shooting was done willfully and was so done as to jeopardise life. If he shoots into the dwelling house so as to endanger life he ought at least to be held equally accountable as when he shoots along the highway. The defendant in this case knew this woman was in the house, for he heard her speak. He was demanding admittance, and she was refusing to admit him. Shooting through the door under such circumstances is a shooting to endanger life, and so done as that the law holds the party shooting to the knowledge that it will endanger life.

The tenth cause is, because the court erred in instructing the jury as to the law of intoxication and the effect of it upon the act of the defendant.

I think it sim'ly necessary to read the charge to become satisfied that there was no error committed by the court in instructing the jury of the effect, under the law, of intoxication. Especially is this true when
314 the defendant in his evidence states, "He was not drunk; only drinking; sober enough to know what he was doing."

The eleventh cause is, because the court erred, to the prejudice of the defendant, in commenting unfavorably upon the testimony of the defendant's witnesses who were uncontradicted and unimpeached; and in failing to comment upon the testimony of the Government's witnesses who were contradicted and impeached; and in saying to the jury, in commenting upon the testimony of the witness, George Maxey, "You are to see whether this witness was subpœnaed in the usual way at the expense of the Government; you are to see whether he is an ex post facto witness; you are to see and find out whether he is a nunc pro tunc witness;" and in saying to the jury that the witness' Maxey, Mattison, Hendricks, Ferrel, and Hankins are swearing to a state of case contradicting the solemn, sworn statements of the defendant in his application for witnesses, and in unfavorably commenting upon the testimony of the said witnesses when they are not impeached or contradicted.

It will be seen that this cause complains of comments made by the court on the testimony of such of defendant's witnesses as were uncontradicted and unimpeached. If comments upon the weight of evidence had been made by the court, such comments can not possibly apply to nearly all of the defendant's witnesses, because the complaint is that it is only such witnesses as were uncontradicted and unimpeached whose evidence was unjustly commented upon. Now, in my judgment, there are no witnesses who are offered as such by the defendant who undertook to swear to a fact that had any proving power that stand before the court uncontradicted and unimpeached. Certainly the witness' Maxey,
315 Ferrel, and Hankins were contradicted by every reliable and reasonable fact and circumstance in the case.

The testimony of Hendricks was indifferent, and the testimony of Earl Mattison was flatly contradicted. And Mr. Mattison does not stand in the best attitude to be believed when we learn that he was around endeavoring to fish out evidence from these women who were attending here as witnesses. The court did not in the charge comment on the weight of the testimony of the defendant's witnesses. It simply gave the jury the rules to govern them in weighing the evidence of such witnesses. But in submitting a case to the jury the judge may in his discretion comment on the evidence, call their attention to parts of it which he claims important, and express his opinion upon the facts. Vicksburg & M. & R. Co. ver-

sus Putnan (118 U. S., 545); Baltimore and P. R. Co. versus Fifth Baptist Church (137 U. S., 568); Insurance Co. Trefz (104 U. S., 197.) This cause even complains that comments were made by the court on the testimony of George Maxey, and that the jury were reminded that they were to see that he was not an ex post facto witness, a nunc pro tunc. Well, George fills out to the full measure the meaning of both of these expressions. What he stated he learned after the fact. What he knew he knew now as for then. I did not use these expressions by way of admonition to the jury in weighing evidence with special reference to George Maxey, but I used them in the charge to be applied by them to nearly all the testimony of the witnesses called by the defendant. They were justly applicable by way of caution to the jury to the evidence of George Maxey, Stephen Ferrel, Charles Hankins, Earlm Mattison, and Andrew Hendricks. The four last named did not pertend to give anything but
316 ex post facto facts, something they learned after the killing. Stephen Ferrel was in jail charged with the crime of incest at the time he learned his facts; Charles Hankins was likewise there upon a conviction for manslaughter when he qualified himself as an ex post facto witness.

The pretended facts they gave were what they claimed to have learned from William Wilson while he was in jail. Such facts are directly contradicted by Wilson and by every other reliable fact and circumstance in the case. They claim Wilson told them Tucker didn't fire the shot which killed Lulu May. Hankins says this was two or three days after Wilson was put in jail. Then it was after he had testified before the commissioner, as he was brought here on the 17th day of October and examined before the commissioner on the 18th of that month. At that examination he swore to facts directly contradictory to what these witnesses say he told them. He there swore to the shooting by Tucker. It is hardly probable he would have done this and gone to the jail and told these witnesses what they say he did. In my judgment, the statements of Ferrel and Hankins are a flagrant perjury. Then we have the statements of Earl Mattison and Andrew Hendricks. It is simply necessary to state that their evidence is insignificant and amounts to nothing. Then it is flatly contradicted by the statements of Lillie Ibison. Truly the testimony of the defendant was ex post facto as well as nunc pro tunc. And his own statements, when you consider the other facts in the case, are hardly free from this characterization. I have tried a good many murder cases, and I am free to say that I have seldom seen the amount of perjury in a case that was injected into this one. It was so manifest as to
317 be flagrant to all who noticed it. The court made no mistake in the cautions it gave to the jury in regard to the evidence of these witnesses.

The 12th cause is, because the court erred to the prejudice of the defendant in directing Deputy Marshal White to arrest the witness, George Maxey, before he left the witness stand, and in having him arrested by said White as he went out of the door of the court room, and taken off to jail in the presence of the jury.

This statement of what occurred is not correct, but a most flagrant misstake. The witness, George Maxey, was arrested outside of the court room, in the passageway leading thereto. The door leading into the room was

closed at the time, and the jury did not see his arrest. The order to arrest him was given privately to the deputy marshal, so they did not hear it. This presents a very different state of case from that presented in this cause for a new trial. It may be well to ask who this George Maxey is. He is a witness who swore on the stand he was kept in concealment here for several days. We know that the defendant is a poor person, and it would be but natural that he would apply to the court to have his witnesses summoned and paid by the Government; yet that was not done in this case. Maxey was subpoenaed privately, not by an officer, but by a private citizen. This was manifestly done to prevent the Government finding out who he was, and what were his antecedents. Maxey swore he was at the scene of the killing, and saw the shot fired that killed Lulu May, and it was fired by William Wilson, and not by the defendant. He was subsequently indicted at this term for perjury, tried and convicted and sent to prison for five years. The proof on his trial showed absolutely and beyond any question that he was in jail at Muskogee at the
318 time the murder was done, 100 miles from the scene of the killing. This is shown by the jail records which prove when he was admitted to the jail and when he was discharged therefrom. It is shown by the statements of the deputy jailer who had him in charge. It is shown by the deputy marshal who arrested him, took him before a commissioner, and upon a mittimus carried him to Muskogee and had him committed to the jail. There can be no dispute about these facts. What has the defendant to complain of? Does this cause in the motion for a new trial mean that he should not have been deprived of the effect of the lie of this hired perjurer? I say hired, because the proof brought before this court when it sentenced Maxey showed that Ed. Tucker, the father of the defendant, bought him a suit of clothes. Should the court in this case have sat quietly by and permitted the jury to have been deceived by the corrupt testimony of this flagrant perjurer? Should the court in this case have permitted Maxey after he committed deliberate perjury for pay to make his escape, as he would have done when he walked out of the court-house, if he had not been arrested? Or did public justice demand that he should be made an example of? Suppose the court had become satisfied of his perjury, as it did while he was upon the stand, because it was manifest, would it not have been its duty to cause his arrest, even in the presence of the jury, if it could not have been done otherwise, rather than permit his escape? The only effect of this cause for a new trial is to complain because the court has done something that the defendant apprehends might have had the effect of depriving him of the benefit before the jury of Maxey's corrupt and willful perjury. It is difficult to realize
319 that this would be really urged as a good ground for a new trial.

The thirteenth and last clause is because of newly-discovered testimony which is shown by the affidavit of J. D. Gunn, which is herewith filed and made part of this motion, whose testimony was discovered after the trial of the cause began and too late to procure his presence at the trial until after the argument of the case had commenced.

The first question the court must look to is whether the statement of this man Gunn is reliable. If it is not reliable, the defendant would not under any circumstances be entitled to it. If it is a bare fabrication, as I believe it to be, then it can cut no figure here, except to further strengthen

the conclusion that the very warp and woof of this web of evidence offered by the defendant is saturated with perjury. The very fact that this witness on the 20th of March, 8 days after this trial was concluded, went to the mayor of the town and made his affidavit, is suspicious. Why did he not speak sooner? He was here during all that time. From the best information I can get the conviction is very strong in my mind that this man Gunn was here in time to have been called as a witness. I believe he was here before the evidence in the case closed. Why did he not make his affidavit before the clerk of this court or before the court, so we could see him? Was he afraid of an indictment for perjury? This man says in his affidavit the gun which shot Lulu May flashed behind the parties at the door, which he would have us believe the defendant and Wilson, some 30 or 40 yards behind. This is shown to be absolutely false by the testimony of Wolverton, who swears that the bullet hole in the door had powder marks seven or eight inches around
320 from where the ball struck. It looked as though the grains of powder went right into the door. This would be impossible if the sho' was fired 30 or 40 yards away. Wolverton say the condition of the door on the morning after the shooting. This of itself proves the statement of Gunn absolutely false. This statement is further contradicted by the voluntary admissions of the killing made by the defendant to Miss Belle Wilson and Miss Tenney Wilson; by the statement of Lillie Ibison, Fannie Orwig, and William Wilson, as well as by every other accusatory fact and circumstance in the case. This man Gunn says in his affidavit he is a travelling insurance man. From the best information I have been able 'o gather he is and has been what is called a tin-horn gambler. My investigation has led me to the belief that he is a man without character and not worthy of belief, and that his affidavit is a falsehood injected into this case for effect. There has been perjury enough in the case. Justice does not demand there should be an opportunity offered for any more, but on the contrary it should be prevented. The defendant in his affidavit is rather indefinite as to when he learned of the evidence of this man Gunn. The facts are this trial commenced on the 9th of March; the evidence was concluded on the 10th; a subpœna was served on Gunn as a witness, not by an officer of the United States, but by a private citizen, on the 9th of March, at Hackett City, in this county, 15 miles from this court. With proper diligence the defendant could have obtained this witness before the evidence closed in the case on the 10th of March. There was ample time for the court to have had him attached and brought here after he was served on the 9th and before the evidence concluded on the 10th.
321 No application was made to the court for an attachment. I have a well-grounded and honest belief that this man Gunn was here when the evidence closed in the case, and I believe he was in the court room during a part of the time when some of the evidence was being heard. And it would require convincing proof to dislodge these convictions from my mind. In my judgment the defendant did not show proper diligence to get the witness after his discovery and before the trial closed. I could not for one moment contemplate setting a verdict aside in a case upon an affidavit no more reliable than this one is. There is nothing in this case that warrants an interference with this verdict.

The defendant attempted to defeat justice *to* resorting to the use of perjured evidence. By the good sense, discretion, and deliberate judgment

of the jury he has been defeated in his efforts in that direction. The verdict is just and right, because supported by the proof and the law, and under that law the jury have properly designated the crime. It should therefore stand, and the motion for a new trial is overruled.

322 And time having been given the defendant to prepare the same he now tenders this his bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done.

I. C. PARKER,
U. S Dist. Judge, holding Circuit Court.

323 *Assignment of errors. Filed June* 19, 1893.

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES } Murder.
vs.
MARSHALL TUCKER. }

Now, on this day comes the defendant, Marshall Tucker, by J. B. Forrester and Wm. M. Cravens, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. Because the court erred in admitting to be read in evidence by the prosecution the application made by the defendant for witnesses, as follows:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF, } Murder.
vs.
MARSHALL TUCKER, DEFENDANT. }

The defendant states that he is charged by indictment pending in this court with murder, and the following-named persons are material witnesses for his defense: Pink Hooper, Crocket Lee, Walter Hughes, and George Stephens.

By the t*hree* witnesses first named, who reside at South McAlester, he can show that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing, and was incapable of forming any design. By George Stephens, who resides at Cameron, I. T., he can show that on the day before the alleged homicide, he shot

324 one load out of defendant's pistol, and after the alleged homicide it was in the same condition as when discharged by said Stephens, which will appear from his and other testimony in the case. These statements he believes to be true, and he is not possessed of sufficient means, and is actually unable to procure the attendance of the said witnesses.

Wherefore he prays they may be subpœnaed at the expense of the United States.

(Signed) M. N. TUCKER.

Sworn to and subscribed to before me this the 20th day of February, 1893.

(Signed) STEPHEN WHEELER, *Clerk.*
By W. B. PAPE, *D. C.*"

2. In admitting incompetent testimony on the part of the prosecution to go to the jury.

3. In refusing to instruct the jury as requested by the defendant as shown by his request for instructions set out in bill of exceptions, as follows:

"If the jury believe from the evidence that the defendant was at the time of the killing of Lula May drunk, and that before becoming drunk he entertained no malice towards her and had no intent to take her life, and that his intoxication was so deep as to render the formation of any specific intent to take life impo-sible on his part, he could not be convicted of murder."

4. In instructing a jury that where the door of a dwelling house is fired into and an inmate is killed this is murder, whether the party intended to kill or not.

5. In instructing the jury that malice is presumed from the act of firing into a dwelling house.

325 6. In instructing the jury that the deliberate use of a deadly weapon shows premeditation, thought of beforehand, and shows malice and a purpose to do a wrongful act.

7. In commenting to the jury and urging them as good citizens to perform their duty, and in commenting upon the crime of murder and the frequency with which it is committed in the Indian Territory, as shown in court's instructions.

8. In instructing the jury as to the law of murder, and as to malice in murder, as shown in instructions given by the court.

9. As to the definition of manslaughter, and in stating to the jury that the only condition that would produce manslaughter or justify a conclusion of manslaughter in this case would be such a state of intoxication on the part of the defendant as would render him incapable of forming any specific intent to take life.

10. In instructing the jury as to the law of intoxication and the effect of it upon the act of the defendant, as shown in instructions appearing in the bill of exceptions.

11. In commenting unfavorably upon the testimony of the defendant witnesses, who were uncontradicted and unimpeached, and in failing to to comment upon the testimony of Government witnesses who were contradicted and impeached; and in saying to the jury in commenting upon the testimony of the witness George Maxey, and saying to the jury, "You are to see whether this witness was subpœnaed in the usual way, at the expense of the Government; you are to see whether he is an ex post facto witness; you are to see and find out whether he is a nunc pro tunc witness." And in saying to the jury that, "The witnesses Maxey, Mattison, Hendrix, Farrell, and Hankins are swearing to a state of case contradicting
326 the solemn sworn statement of the defendant in his application for witnesses."

And in unfavorably commenting upon the testimony of the said witnesses when they were not impeached or contradicted.

12. In directing Deputy Marshal White to arrest the witness George Maxey before he left the witness stand, and in having him arrested by [illegible] White as he went out of the door of the court room, and taken off to [illegible] in the presence of the jury.

13. In not granting a new trial on the ground of newly discovered testimony, as the same appears from the affidavits of J. D. Gunn and Marshal Tucker, shown in bill of exceptions.

MARSHAL TUCKER,
By J. B. FORRESTER, and WM. M. CRAVENS,
Attorneys for Defendant.

327 *Petition for writ of error—Filed June* 19, 1893.

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
MARSHALL TUCKER. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner respectfully represents that at the February term, 1893, of this said court he was convicted on an indictment charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court removing said cause and the record therein to the Supreme Court in order that the same may be there examined, and if error be found that the judgment and sentence against him therein may be reversed.

MARSHALL TUCKER,
By J. B. FORRESTER and WM. M. CRAVENS,
His Attorneys.

327½ *Poverty affidavit—Filed June* 19, 1893.

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
MARSHALL TUCKER. } Murder.

I, Marshall Tucker, the defendant in the above-entitled cause, do solemnly *swear* that I am not possessed of sufficient means, and am unable to procure the same so as to prosecute the appeal taken in the said cause in the Supreme Court of the United States, and am not worth $10.00 above my wearing apparel.

I therefore pray that it be prosecuted in forma pauperis.

M. N. TUCKER.

Sworn to and subscribed before me this the 20th day of June, 1893.

STEPHEN WHEELER, *Clerk.*
By J. M. BAXTER, *D. C.*

328 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the U. S. circuit court for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States of America and Marshal Tucker, a manifest error hath happened, to the great damage of the said Marshal Tucker, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 27 day of June, in the year of our Lord one thousand eight hundred and ninety-three.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Arkansas.

Allowed by

Justice of the Supreme Court of the United States.

329 UNITED STATES OF AMERICA, *ss:*

To Jas. F. Read, U. S. district attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Marshal Tucker, under indictment for murder, is plaintiff in error, and the United States defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, judge of the district court of the United States for the western district of Arkansas, this 29 day of June, in the year of our Lord one thousand eight hundred and ninety-three.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

330 On this day of , in the year of our Lord one thousand eight hundred and ninety , personally appeared before me, the subscriber, , and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I, Jas. F. Read, U. S. dist. attorney for the western dist. of Arkansas, hereby accept service of the within citation this 29 day of June, 1893.

JAS. F. READ,
Dist. Atty.

331 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of U. S. vs. Marshal Tucker, the original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 8th day of July, A. D. 1893.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsed on cover): Case No. 15554. Term No., 970. W. Arkansas, C. C. U. S. Marshal Tucker, plaintiff in error, vs. The United States. Supreme Court U. S., clerk's office. Received July 22, 1893. Filed July 22nd, 1893.

Office Supreme Court U. S.
FILED,
NOV 10 1893
JAMES H. McKENNEY,
CLERK.

—IN THE—

SUPREME COURT OF THE UNITED STATES.

No. 970.

MARSHAL TUCKER, PLAINTIFF IN ERROR.

V.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

A. H. GARLAND,

Counsel for Plaintiff in Error.

J. M. CAIN, ARTIST PRINTER, FT SMITH, ARK.

—IN THE—

SUPREME COURT OF THE UNITED STATES.

CASE No. 15,354. TERM No. 970.

MARSHAL TUCKER, PLAINTIFF IN ERROR.

V.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

The plaintiff in error was indicted November 16, 1892 in the United States Circuit Court for the Western District of Arkansas, charged with the murder of one Lula May, in the Choctaw Nation, Indian Territory. The Indictment charges that the homicide was commited on the 15th day of September 1892 with a gun. (Record page 1.)

At the trial the Government introduced the following witnesses, whose testimony was substantially as follows:

Lillie Ibison said she knew the deceased Lula May and Marshal Tucker; that at the time Lula May was killed she and witness lived together between a mile and 3-4 mile from South McAlister.

She was killed on the 15th day of September 1892, between 8 and 9 o'clock at night. She and deceased were keeping a bawdy house there, and the place they were living in was a small shanty something like half way between the old and new towns. Marshal came to the house and wanted to get in, but was refused admission by Lula; Tucker had been at the house before; but one of the girls in the house started to open the door, before it was opened a shot was fired from without through the door, and Lula May fell dead on the floor. She went out and saw Marshal Tucker and Willie Wilson standing near the door. Fannie Orwig, witness and deceased were the only persons in the house at the time of the shooting. Two men were at the place before Tucker and Wilson came, but had been gone about half hour before last two came, and it was after dark before they left, did not know what became of them. Tucker gave his name when he wanted in; he had been there before, and all the girls knew him. The windows and doors of the house were shut when Lula was shot, and witness did not see who fired the shot that killed Lula. After the door was opened Marshal was standing about three feet back from it and Wilson was standing behind

him; she refused to say whether she was friendly or unfriendly to Tucker. She denied saying to witnesses Hendricks and Mattison that she did not know much about the case, but that she was going to swear enough to break Tucker's neck, but admitted to talking to both of them. Tucker shook hands with Fannie Orwig and appeared friendly. There are trees out from the house. (R. 6-32.)

Fannie Orwig swore that she thought Lula May was killed about the 14th or 15th of September 1892, could not say positively, between 8 and 9 o'clock at night. Tucker came to the door and wanted in and Lula said, "who is that?" and he replied: "Marshal Tucker," and he wanted her to open the door, but Lula said she had company, but Marshal kept knocking, and she started to open the door and some one shot through the door and hit her in the head and she fell and immediately expired.

Witness lived there and was an inmate of the bawdy house. The witness ran out and said to Tucker "for God's sake don't shoot any more." He spoke to her kindly and said: "*It is done*," or "*We have done it*" she could not tell positively which. Tucker had a pistol in his hands. Witness said she was the first one out and the first to speak to Tucker. Billie Wilson was with Tucker, standing near him at the time, about 6 feet from the steps, at the corner of the house near a water barrel. He held his pistol in his hand by his side. Tucker acted "kind o' funny" when she first went out but in a little while talked naturally and

shook hands with her. She heard some one from the outside say: "Don't shoot." She thought it was Wilson who said this; she did not see any weapons on Wilson. When Tucker and Wilson came up they were talking, and one of them knocked on the door, she did not know who did the shooting. Tucker was about 10 feet from her, she could not say whose voice it was at the door, saying: "Open the door." The two men who were at the house before Tucker and Wilson came were armed, with pistols, as she supposed, as they had on belts with catridges in them. Lula said, 'Marshal don't do that, I have company.' She thought he was joking. He went around to the door and talked to the girls two or three minutes. (Record page 32-41.)

William Wilson said Tucker got to South McAlester on the evening of the death of Lula May, and he and witness were together all evening, and Tucker asked witness if he did not want to go to old McAlester, and he agreed to go with Tucker over there saying, "I did not care if I did walk over there," and they both stopped at the house of deceased, but they had started over to Old Town. When they stopped at the house he said Marshal stopped at the door and Lula asked who was there and he told her it was Marshal Tucker, and she said she had company. He told her to open the door and pounded the door with his pistol, and stepped back off the steps and the pistol fired. There were prints of the pistol bruises on the door. Lula May was shot through the head. Witness was standing some

distance away from where Tucker was standing when the pistol fired. He said he was not armed. Tucker was intoxicated. Witness was arrested and tried by a U. S. Commissioner for the Western District of Arkansas, and was bound over to the next session of the Circuit Court for said Circuit at Fort Smith, Ark. He had been at "Chippy Hill" several times before, although he had not been living in the community but a short time. The road they went to this house was not the main thorough fare, and could not be used by vehicles. Tucker said he had some papers to serve over at Old McAlester. It was a star-light night. Witness was at the water barrel as the shot was fired. The water barrel was at the corner of the house. After the shooting in which Lula May was killed, Tucker and witness returned to South McAlester a distance of ¾ of a mile. Witness and Tucker were brought down together to Fort Smith charged with the murder of Lula May and put in jail. Witness was once before arrested for the killing of a man at Jenson, Ark, under similar circumstances, at a bawdy house. One Thomas Harper and he were arrested under said charge. In that case he also testified against Harper, and both difficulties occured near each other and in each case he turned as witness against the person with whom he was arrested. Tucker said he did not do the shooting. Witness remembered that on cross-examination that he did say, "I did not do it," referring to the charge that Tucker shot Lula May. *When the woman Fannie told*

him he had shot Lula, he said he did not do it, and witness so said immediately after the killing of the woman May. Witness never said Tucker drew a pistol at the door of the bawdy house, but saw him put his hand to his side. Tucker had been, before the time of the death of Lula May at witness' father's house about a month. He does not recolect saying to Farrell and Hankins in jail that he knew nothing of the shooting. He said he had no recollection of talking to them as to what he would testify, but did have conversations with them while they were all in the United States Jail (Record 41-68).

Belle Wilson testified that she was sister to William Wilson and resided at South McAlester at the time of the death of Lula May, and knew Marshal Tucker. He came to her father's house the evening of the alleged killing of Lula May and took supper; her father kept a hotel; after supper he went up in town and she did not see him again until about 9 o'clock that same evening. He told witness that he was in trouble, that some one had been killed down in town, and he was accused of the killing. He had a pistol in his pocket, and gave it to witness at her request. Tucker was drinking and regretted the death of Lula May. When Mr. Tucker returned after the shooting he was still drunk; he remained at her father's house until Will Neal, a United States Deputy Marshal; came and arrested him and took him away; he had been at her father's house for an hour or two before Neal came, and made no effort to con-

ceal himself. Tucker, when he came back to the house, said a woman had been killed in town and that he was accused of being the cause of her death. On cross-examination witness in reply to this question: "Didn't he tell you then he didn't do it," said, "Yes sir, he said once he didn't do it and he told me after that—. Q. "That was night at the time or when he said he was accused of it?" A. "Yes sir; along about that time." "He said some one down town was killed and he was accused of it, but he did not do it." There was no one in the room at any conversation with Tucker but her and her sister (Record 71-72). When Tucker came to her father's house he was drinking and when he returned he was drinking. Worse when he came back. He was in the front room of her father's house when the Deputy Marshal came after him and he made no resistance or objection to arrest, and went off quietly with the officer (Record 68-76).

William Wilson recalled, said when Tucker came he smelled whiskey on his breath, and that after he came he drank some sort of cider. Before they started that evening witness got a quart bottle of the cider, and he and Tucker drank it; it was hard cider (Record 76-77).

Tennie Wilson testified that she lived at South McAlester and was a sister of witness William Wilson, and knew Marshal Tucker; he came to her father's the evening of the death of Lula May, ate supper there and went off up town, and came back at 9 o'clock; she did not hear

what he said when he returned. He said he was accused of the killing of a woman down town; she was sick and in bed when Tucker came back; he talked to her sister Belle and not to her. She said he never told her sister Belle that he did not do it, but that he did do it. He was much more drunk when he returned than when he went away; he acted a great deal drunker. Her brother William was not there about the house after Tucker came. She could not detail the entire conversation had by Tucker; she was sick and gave it no partieular attention, believing that his report of the killing was the result of whiskey (Record 78–81).

TESTIMONY OF THE DEFENSE.

Stephen Ferrell testified that he knew William Wilson, witness for the government. They were confined in the United States Jail together at Fort Smith, Ark; they were together about a week. Wilson was in jail under the charge of the murder of the woman May. He knew Tucker. Tucker and Wilson were put in jail at the same time. When Wilson was in jail he had a conversation with him about the killing of deceased, and Wilson said, to use the exact language of witness, "He said that him and Marshal Tucker went to the house together; went up to the house and Marshal knocked at the door; got onto the second step as well as I recollect, and about the time he knocked, there

was a report of a gun and the ball passed his head and Marshal did not shoot." He said the report of the gun was from behind. He said he was behind Marshal, when the report of the gun was heard. He saw no flash of a pistol, only heard the report. He said Tucker did not shoot; Wilson said he came as a witness for Marshal. There were several persons in jail present at the time of this conversation; some of them are now out. Charley Hankins and Tom Shepard were present at this converation, as he recollected. Witness knew Tucker when he was a boy; he was reared in Arkansas in the county Fort Smith is in, but witness had not seen Tucker nor any of his family for several years. In this conversation Wilson and Tucker were drinking and that he and Tucker went to Lula May's house to have a little fun. Witness was in jail at that time charged with the crime of incest, but was then on bond and stated that he was not guilty of the charge; witness said he was not related to Tucker, and that he had no bias or feeling in the case (Record pages 82-89).

Chalres Hankins said he knew witness Wilson in the U. S. Jail at Fort Smith, Ark., and Wilson had a conversation with him in reference to the alleged killing of Lula May by Marshal Tucker. To use witness' exact language: "Him and I were talking about the shooting at McAlester; I asked him if he had any idea who it was did the shooting, and he said he had not; he said the shot came in from behind somewhere, and he did not know where; he had

no idea who did the shooting." This conversation took place in the jail some two or three days after Wilson was put in. Witness and Wilson were put together in the same cell (Record page 90). They had several conversations and Wilson always claimed that Tucker did not do the shooting, that the shot came from behind him and Tucker; Wilson further said: "I can't swear anything at all that will hurt him." He further said: "I am going to swear the truth." Witness said he was charged with the crime of murder, and was then under conviction for manslaughter. He killed a man endeavoring to make an arrest upon him; he was at the time a United States Marshal. He was reared near Fort Smith in the State (Record pages 89-91).

George Maxey stated that he lived in the Choctaw Nation and was at McAlester on the night of the killing of Lula May, and was within forty or fifty feet of where she was shot, having just before come up from the hotel at South McAlester. When he got near the house he heard Tucker talking rapidly and crossly and he stepped up closer and got behind a tree, and about that time a pistol fired from behind Tucker, Tucker was a little to the left of the door; he had one foot on the door-step, and the shot was fired from behind, as he saw the blaze from behind, and saw the man who had hold of it. The man who fired the shot was shorter than Tucker. He knew both Tucker and Wilson. Wilson fired the shot. After the shooting he got away as

soon as he could, and learned next day that a woman was killed there that night. He first told the father of Tucker about what he had seen (Record pages 92-112).

Marshal Tucker, the defendant, in his own behalf testified that he resided four miles east of Poteau, Choctaw Nation, I. T., with his father, Ed. Tucker. He arrived at South McAlester, I. T., near where Lula May was killed on the evening of the same about 7 o'clock, on the Choctaw coal train, from Jenson, Ark. He was subpœnæd as a witness and went there in pursuance of the summons; he was working for the South McAlester court; he was drinking that day; he went to the home of old man Wilson's for supper, had met witness Wilson at the depot. After supper Wilson suggested a walk up town to which he assented. They went to Wilson's billiard hall and Wilson called out the cider and they drank; afterwards he said: "suppose we go up to Chippy Hill for a little fun," and he said: "I would as soon go as not," and told Wilson to lead the way, and they took a pathway to the house. It was a rugged route, rough and large boulders were standing all along the route. He fell down three or four times going over them, and sprained his ankle. They approached the house from the east side; Wilson said there are some pretty good girls here, and said: "Let's go in and see them," and said: "Hello, girls;" and they said: "Who is there?" and he said: "A friend;" and then said, "Marshal Tucker," and just as he pronounced his name there was a shot fired and

he jumped to one side of the step; he did dot know whether the shot was fired from the inside or outside of the house, and he jumped to one side and Wilson handed him the pistol. He did not know until then that Wilson had a pistol. After the shot was fired the door was opened and the girls came running out and some one of them said: "Law, Marshal, you have killed Lou;" and he said: "I have done nothing of the kind;" and one of them came up and shook his hand, and he said: "Don't run to me and accuse me of doing anything of the kind; I have done nothing of the kind." He and Wilson then returned to South McAlester, and separated before getting to the hotel, and he went to Wilson's to go to bed, and Wilson went down town. When he arrived at the house Belle Wilson, witness for the prosecution, said to him: "You sleep with Willie Neal," (the Deputy Marshal), and he said: "Very well," and pulled off his pistol and said: "Lay this away until morning," and he said: "I saw a little trouble happen over here to-night and me and Billy, [the brother] may be accused of it, and I hope not," and Willie Neal got up and went up town, and returned and said to him: "You are accused of the killing," and he said if he were accused of it, he would at once surrender, and at once went to Jack Ellis, a deputy marshal and called him out and said: "I am accused of this killing and I want to give myself up, and I can prove myself clear;" and he told me to go up to Killpatrick's, an officer, and lay down until morning, which

he did, and when he awoke next morning there were two or three men in the room guarding him, he supposed. This all occurred on the *15th day of October* 1893, at night. He did not fire a shot at all at the house (Record pages 114-115]. They did not start to old town, and the first he ever heard of that was from Wilson in jail at Fort Smith; Wilson did not want his father to hear that he was going to a bawdy house. He had not seen his pistol since *he delivered it to Belle Wilson*, and did not know the condition of it. She is a sister of Wilson. He denied that he ever told any one that he shot the woman; he did say that he was not guilty of the killing. When Neal went up in town to investigate the matter, he undressed and laid down in bed. When he went to surrender to Jack Ellis, he did not carry his pistol, nor did he ask for it. He was intoxicated that evening. He drank a great deal of cider before going to the bawdy house, and drank on the way over there. He knew the deceased, and had no unfriendly feelings toward her. He did not know where the inmates of the house were, in what part of it, at the time the shot was fired. On cross examination, he said he remembered what occurred the evening of Lula May's death, but that he was drinking heavily. In walking he would stumble. The District Attorney then asked him: "You filed an application for witnesses here did not you (Reading the application to him)?" "By the other witnesses named, who reside at South McAlester, defendant can show that he was so intoxicated at

the time of the alleged homicide that he did not have any knowledge of what he was doing, and was incapable of forming any design."

Q. "That purports have been signed by you, M. N. Tucker, and sworn to the 20th day of February, 1893?"

"Mr. Cravens (of counsel for defense). That is what he said he could show by this witness."

The Ass't Dist. Attorney. He swears this statement he believes to be true, and that he is not possessed of sufficient means, and is actually unable to procure the attendance of said witnesses. This is your signature is it not?" A. "I rememember that paper." Q. "That is your signature?" A. "Yes sir, that is it." Q. "It seems since the 20th of February, last month, not thirty days ago, you have changed your mind about whether you knew what was going on there or not?" A. "No sir, my mind is not changed on this at all." Q. "When you swore to that you said you didn't know what you were doing, and had no mind at all?" A. "There was no such question as that asked me at all."

He said he was very drunk that day (Record pages 120-121). He has never said Wilson fired the shot: he did not know who fired the shot (Record pages 113-123).

Earle Mattison testified that he had lived at Fort Smith, Ark., for the past ten years; he knew witness Lillie Ibison, but slightly. She spoke to him two or three times in the hall of the U. S. Court about the Tucker case; she

said she was a witness in thecase and if her evidence would do any good "they would stick him." About this time Andy Hendricks came up and she said: "I will swear anything to stick him." He was not acquainted with Marshal Tucker nor of kin to him (Record page 123). He did not know the case was being tried. He had never seen Tucker's father. He at that time was working for a merchantile firm in Fort Smith and that was the first time he was ever in the court house. His firm employed him to be at the court house to procure business for it and that it was his business, to try to sell persons about the court house goods. He did not expect to be a witness in the case. He asked all the witnesses in what cases they were subpœnæd, to ascertain if they had given any orders to others [Recrrd pages 123-125].

Andy Hendricks testified that he lived in Fort Smith, and was in the dry goods business at the time of the trial of Tucker, and his business as such, dry goods clerk, called him to the court house, to collect from witnesses in attendance. He heard witness Lillie Ibison say, in reference to the Tucker case, in the hall of the court house, that she would do all she could to stick him, meaning Tucker; he overheard her say that; he had no interest in the case; he was not acquianted with Tucker but had seen him about the court. It was here admitted that the killing occurred on the night of the 15th October [Record page 127].

The testimony for the defendant being closed, the

government then offered and read in evidence the following application of Tucker for witnesses:

"UNITED STATES, Plaintiff.
vs. } *Murder.*
MARSHAL TUCKER, Defendant.

The defendant states that he is charged by indictment in this court with murder and the following named witnesses are material witnesses for his defence: Pink Hooper, Crocket Lee, Walter Hughes and George Stephens. By the three witnesses first named, who reside at South McAlester, he can show that he was so intoxicated at the time of the homicide that he had no knowledge of what he was doing and was incapable of forming any design. By George Stephens, who resides at Cameron, I. T., he can show that on the day before the alleged homicide he shot one load out of defendant's pistol, and after the alleged homicide it was in the same condition as when discharged by Stephen, which will appear in his and other testimony in the case.

These statements he believes to be true, and he is not possessed of sufficient means and is actually unable to procure the attendance of said witnesses. Wherefore he prays that they may be subpœnæd at the expense of the United States. M. N. TUCKER.

Sworn to and subscribed before me, this 25th day of February, 1893. STEPHEN W. WHEELER, Clerk,
By W. B. PAPE, D. C."

To the production and reading of the same the defendant objected, his objection was overruled and he then and there excepted, and had the same then and there noted of record (Record pages 134-135).

The government then offered W. O. Wolverton as a witness, to show that the door through which there was a hole, was powder burnt, and he was permitted by the court to so state, to which defendant then and there objected, his objection was overruled, and he then and there excepted and his exception was duly noted of record (Record page 135). It appears from Wolverton's evidence that the door has been spirited away, and cannot be found (Record page 138).

W. B. Pape testified that he was a Deputy Clerk and read the application of defendant for witness before he signed it. The defendant then and there objected, his objection was over-ruled, and he then and there excepted and had his exception duly entered of record (Record page 142).

This was substantially all the evidence adduced at the trial.

ASSIGNMENT OF ERRORS.

1. The Court erred in permitting to be read to the jury in evidence defendant's application for witnesses, to-wit:

"The defendant states that he is charged by indictment, pending in this Court, with murder, and the following named persons are material witnesses for his defense: Pink Hooper, Crocket Lee, Walter Hughes and George Stephens.

By the first three witnesses named who reside at South McAlester, he can show that he was so intoxicated at the time of the alleged homicide, that he had no knowledge of what he was doing, and was incapable of forming any design. By George Stephens who resides at Cameron, I. T., he can show that on the day before the alleged homicide, he shot one load out of defendant's pistol, and after the alleged homicide it was in the same condition as when discharged by said Stephens, which will appear from his and other testimony in the case. These statements he believes to be true, and he is not possessed of sufficient means and is actually unable to procure the attendance of the said witnesses.

Wherefore he prays they may be subpœnæd at the expense of the United States.

[Signed.] M. N. TUCKER.

Sworn to and subscribed before me this 20th day of February, 1893. STEPHEN WHEELER, Clerk.

By W. B. PAPE, D. C."

2. In admitting uncompetent testimony on part of the prosecution, particulars of which will be called attention to in the brief.

3. In refusing to instruct the jury as requested by the defendant, to be particularized in brief.

4. In instructing the jury that when the door of a dwelling house is fired into and an inmate killed, this is murder, whether the party intended to kill or not.

5. In instructing the jury that malice is presumed from the act of firing into a dwelling.

6. In charging that the deliberate use of a deadly weapon shows premeditation and malice.

7. In urging the jury as good citizens to do their duty, and commenting on the frequency with which crime is committed in the Indian Territory.

8. In instructing the jury as to the law of murder, etc.

9. In erroneously defining murder and manslaughter, etc. etc.

10. The same when defendant is in an intoxicated, drunken state, etc.

11. In commenting unfavorably upon the testimony of the defendant's witnesses who were uncontradicted and unimpeached, and in failing to comment on the testimony of the government witnesses who were contradicted and impeached, and in saying to the jury in commenting upon the testimony of the witness George Maxey: "you are to see whether this witness was subpœnæd in the usual way, at the expense of the government; You are to see whether he is an expost facto witness; you

are to see and find out whether he is a *nunc pro tunc* witness. And in saying to the jury in the charge that, "The witness Maxey, Mattison, Hendrix, Ferrell and Hankins are swearing to a state of case contradicting the solemn statement of the defendant in his application for witness." And in unfavorably commenting on the testimony of the the said witness, when they were not unimpeached or contradicted.

12. In directing Deputy Marshal White to arrest the witness George Maxey before he left the witness stand, and in having him arrested by said White as he went out of the door of the court house, and taken off to jail in the presence of the jury.

13. In not granting a new trial on the ground of newly discovered testimony, as appears from the affidavits of J. D. Gunn and Marshall Tucker, shown in the bill of exceptions (Record pages 186-1888).

BRIEF AND ARGUMENT.

In this brief of the argument, the divisions and numbers will be observed in their order, as set out in the Assignment of Errors.

1. The plaintiff in error filed an application for witnesses after his indictment in the court below under and in pursuance of Section 878 R. S. [Record page 2], to-wit: "When any person indicted in a court of

the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held * * *; and that he is not possessed of sufficient means, and is actually unable to pay the fees of witnesses, the court in term, or any judge thereof in vocation, may order that such witnesses be subpœnæd if found in the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnæd in behalf of the United States."

The order of the court for certain witnesses applied for by the plaintiff in error was made upon said affidavit, February 21, 1893 (Record page 2).

While the plaintiff in error was on the witness stand, in his own behalf, and after he had sworn that he had recollection of what transpired at the door of the deceased when it is claimed by the prosecution the womam May was killed by a gun shot, the prosecution read to him his sworn application for witnesses at public expense, in which it is stated, among other things, that he could show by witnesses, "That he was so intoxicated at the time of the alleged homicide that he did not have any knowledge of what he was doing, and was incapable of forming any design," and the "statement he believes to be true" (Record page 119). The

prisoner replied that the question was not asked him in that way; that he was drinking, and those witnesses knew he was drinking *ib.* To which the prisoner then and there, by his counsel, excepted, *ib.*

The prosecution then offered, and the court permitted it over the prisoner's objection, to introduce the prisoner's sworn application for witnesses, to which he, through his counsel then and there excepted (Record pages 134-135). The court also permitted, over the prisoner's objection, the deputy clerk, who swore the prisoner to the application, to state that he read the application to the prisoner in the U. S. Jail, to which, through his counsel, the defendant excepted (Record page 142). These rulings of the court are confidently urged as errors, being greatly prejudicial to the prisoner's defense and were in violation of *Section* 860 *Revised Statutes of the United States:* "No pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any *criminal proceeding*; or for the enforcement of any *penalty* or *forfeiture:* Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." The italics above are ours.

The witnesses applied for were ordered subpœnæd *by*

the court on the 21st day of Feb'y. 1893, at the Feb'y. term thereof, 1893 (Record page 2).

Parker J. in over-ruling the motion for a new trial herein, in discussing the legal effect of this statute, said : "This affidavit is not a pleading in the sense of the word used in the statute, nor is it a discovery, such as is there meant, for the word as used in the statute, means a discovery as required in equity practice." * * * "It does not mean evidence obtained from a party or witness by means of judicial proceedings in this or any foreign country in the sense of that term as used in the statute," (Record page 179]. The statute, it is apprehended, will be liberally construed so as to reach the end aimed at. The prisoner had been indicted, arrainged and pleaded not guilty. His case was in a court having jurisdiction of the person and offense charged in the indictment (Record page 2). Not being able financially to procure the attendance of witnesses to testify in his behalf he was compelled to make an affidavit of the character filed by him to secure the attend ance of such witnesses as the court would allow, at public expense. It was "by means of a judicial proceeding" and by that means only that his witnesses, under the state of case, could be summoned or forced to attend the trial and testify. The statute comprehends any character of testimony prejudicial to the cause, which he is forced to disclose.

Boyd v. United States 110 *U. S.* 616.

In discussing the meaning of the word *pleading* in a statute, the Supreme Court of Mass, says: "It was argued by the learned attorney for the Commonwealth, that the words of the Constitution, that no pardon granted before conviction 'shall avail the party pleading the same,' imply that it cannot be taken advantage of after verdict in the first prosecution for the offense in question because the time for pleading is then past, but 'pleading' as here used, may well include any *suitable* form of bringing the pardon to the notice of the court, by plea, motion or otherwise."

Commonwealth v. Lockwood 109 Mass. 331.

Construing the 5th Sec. of an Act of Congress approved June 22, 1874, giving the court power under certain circumstances to require the production of books, paper's etc., belonging to a disteller required under the revenue law to be kept by him, Dyer J, said: "If section 860 were now in full force in its original terms there is little doubt the books and papers of these claimants could not be used against them, *because they would then be evidence obtained from the claimants by means of a judicial proceeding for the enforcement of a forfeiture.*

United States v. Three Tons of Coal 6 *Biss.* 388-9.

Continuing, this court said: "In the case of the *U. S. v. George Hughes, et al*, unreported Judge Blatchford ex-

cluded the books and papers of the defendant, seized upon warrant issued under the second section of the Act of March 1867, because in the language of section 860, *R. S.* they were evidence obtained from the defendants *by means of a judicial proceeding* in a suit for the enforcement of penalties" *id.* 389. The case under consideration by the court *supra* was an action *in rem* for the forfeiture of three tons of coal, and the question was, was the case of a civil or criminal character. We shall revert to this case further on, in the argument.

The Circut judge in over-ruling the motion for a new trial herein further said, that in a case like the one at bar, where Tucker in his own behalf as a witness testified that he had recollection of what occurred, the application was admissible for the purpose of contradicting his testimony (Record page 179). That most assuredly would be the effect of it. It will be remembered that the prisoner stated in his application that he could show certain facts by certain witnesses. If a voluntary and contradictory statement had been made to a private individual by the prisoner, it would not be urged that the contradictory statement was not admissible because it was not obtained by a judicial proceedings. The Fifth Amendment to the Constitution of the United States is a guarantee in our opinion against the introduction of this affidavit; the introduction of it in effect, compelled the prisoner to become a witness against himself, or, which is the same thing, the law re-

quired him to do a thing which might afterward be used against him. The apparent conflict between the statements in his application for witnesses and his testimony was used with vehemence by the prosecution in the argument as showing a shifting of his defense, and no doubt had a great weight with the jury in determining the issue of life or death. The Circuit judge on this assignment said: "The rule contended for would prohibit the contradiction of the defendant as a witness by showing he had given evidence before the Commissioner different from what he gave on the stand." Not at all; in the former instance the information or evidence is *obtained by a judicial proceeding* which he could not prevent, in the latter, he exercises his volition as to whether he will testify in his own behalf. The proviso to the statute, it occurs to us, explodes the position of the learned Circuit Court on this proposition; it is there provided that the "*Section shall not exempt any party or witness from prosecution and punishment for perjury in discovering or testifying as aforesaid*" *Sec.* 860, *R. S.* There is no qualification as to what the purpose of the government was in the introduction of the application. It could not "be given in evidence or in any manner used against him," *ib.*

This is a universal proposition, plain and unambiguous.

In an action for penalties and forfeitures for a breach of a copyright of chromos, under sec. *4965, R. S. U. S.* the defendant cannot be compelled to produce in evidence his

books of account. photographic copies and printed chromos.

Johnson v. Donaldson 3 Fed. Rep. 22.

The court held that the books of account etc., etc., could not be used as the action was for penalties and forfeitures quoting section 860 *supra*. The court further held ; "Irrespective of this statute it would be contrary to all precedents and a violation of one of the most familiar rules of the common law, to require a witness to furnish evidence to convict himself or subject himself to a penalty or forfeiture." The fact the defendant is a witness for himself does not deprive him of the right of ordinary witnesses,

Johnson v. McDonald, ante.

The fifth section of an Act of Congress, approved June 22, 1874, entitled "An Act to amend the Custom s Revenue Laws," etc., authorizes a court of the United States, in revenue cases, on motion of the attorney for the United States to compel the defendant, or claimant of the goods, to produce in court, books. invoices, papers, etc., or else the allegations filed by said attorney shall be taken *pro confesso*. The construction of this act came directly before this court in the case of—

Edward A. Boyd and George H. Boyd, claimants of the

thirty-five cases of plate glass v. United States, 116 U. S. 747, and was decided February 1, 1886

The facts of this case, briefly stated are: That certain goods in question were imported into the United States to the Port of New York, and were subject to the payment of duties; and that the owners or agents thereof committed certain frauds described in the statute., etc. The claimants, Boyd & Boyd, pleaded that the goods did not become forfeited, etc., etc. On the trial it became necessary to show the quantity and value of the glass, and the District Attorney offered in evidence an order of the District Judge made under secton 5, of the act requiring claimants to produce the invoice, etc., of glass. They did so, under protest; and when it was offered in evidence they objected to its reception, because the suit was for a forfeiture, and that the statute was unconstitutional and void. The section of the statute claimed to be unconstitutional and void, is set out, *in haec verba* in the opinion of the court. The court then gives a history of the act, and recites the grounds of objection urged to it, viz: That the 5th section of the act is repugnant to the Fourth and Fifth amendments to the Constitution. The court in this case through Mr. Justice Bradley in referring to the acts of 1863 and 1867, out of which the 5th section of the act of June 22, 1874, grew said: "By the act of February 25, 1868, entitled 'An Act for the protection in certain cases

of persons making disclosures as parties, or testifying as witnesses' 'the substance of which is incorporated in *section* 860. *R. S.*, was enacted.'"

"This act," said the court, "abrogated and repealed the objectionable part of the act of 1867 which was then in force, and deprived the government officers of the convenient method afforded by it for getting evidence in suits of forfeiture; and this is probably the reason why the Fifth Section of the act of 1874, was afterwards passed. No doubt it was supposed that in this new form, couched as it was, in almost the language of the 15th section of the old judiciary act except leaving out the restriction in which the Court of Chancery would decree a discovery, it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained; and that the law, though very speciously worded, is still obnoxious to the prohibition of the Fourth Amendment of the Constitution as well as of the Fifth." *Pages* 751-752. It will be remembered that the act of 1874, expressly excepts *criminal suits and proceedings*, but does not except suits for *penalties and forfeitures*. But *with* its exceptions, the court concludes that the act is obnoxious to the Fourth and Fifth Amendments to the Constitution.

Several decisions of the Circuit Court and District Courts have been rendered, sustaining the constitutionality of the laws of 1863-67. The court cites the following cases:

Stockwell v. United States, 3 *Cliff.*, 284.
R. Platt and Boyd, 7 *Benedict*, 261.
United States v. Hughes, 12 *Blatch.* 553.
United States v. Mason, 6 *Biss.* 350.
United States v. Three Tons of Coal, id, 379.
United States v. Distillery *No.* 28, 483.

The court takes up these cases and shows the error of these courts, and declares their arguments unsound.

It then follows that the Section of the Revised statutes under discussion is not repealed or amended by the Act of 1874. The anology between the case at bar and *Boyd v United States supra* is complete and this Boyd case is therefore decisive of the question involved in this assignment of error.

2. Passing this assignment we stop at aisignment numbered three.

3. The court should have given this instruction; it plainly and succinctly, without ambiguity, states the rule, that if the defendant was at the time of the killing of Lula May drunk, and that before becoming drunk he entertained no malice toward her and had no intent to take her life, and that his intoxication was so deep as to render the formation of any specific intent to take life impossible on his part, he could not be convicted of murder. This instruction, asked for by the prisoner and refused by the court, concretely lays before the jury a state of case

plain and simple (Record page 171). It was claimed that this charge was given by the court, in substance.

It is true the court did instruct generally on the subject of the responsibility etc. of a person intoxicated, but no where in the courts, charge will be found the statement so specifically applicable to the case, as that prayed for by defendant (Record pages 160-168). Here the jury's attention is particularly called to the state of case contended for by the prisoner's counsel.

It is shown by the whole volume of the testimony that the prisoner was drunk, and that he had no malice towards the deceased. "When a particular condition of mind is requisite to constitute an offense, intoxication may be proved to explain such condition."

1 Wharton Crim. Law. 9th ed. Sec. 51.

This author further observes : "The true view, therefore, is, not that the fact of liquor having been taken effects the issue when the offense is shown to have been premeditated, but that when there is no evidence of premeditation *aliunde*, and the defendant is proved at the time of the occurrence to have been in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show that the defendant was at the time in hot blood, making him peculiarly susceptible to supposed insult which would reduce the offense at common law to manslaughter." The court is asked to exam

ine the foot notes to this section given by this author. He says that it is the settled doctrine that where no prior intention is shown, drunkenness is a condition from which hot blood may be inferred and therefore deliberateness negative, citing many authorities to support the text. *ib*, Sec 54.

When the shot was fired that laid Lula May prostrate in the door of her home, sheltering her and her associates in sin, and ushered her soul into eternity, the prisoner had no ill will toward her, nor knew he her whereabouts.

4. This assignment is touched on in No. 3.

5. Likewise is this assignment.

6, 7, 8, 9, 10, are incidentally noticed under the argument in No. 3, and the points urged therein will be elaboreted in the following Assignments of error.

11. This assignment of error goes to the courts unfavorable comment upon the character of the evidence of witnesses George Maxey, Mattison and Ferrell and Hankins The comment of the court complained of is not anexpression of opinion as to the facts in the case, but acharge. It will be remembered that Maxey swore that the man behind Tucker fired the fatal shot, and that it was witness Wilson; who, at the time was also charged with the murder of the deceased; Mattison stated that the witness Ibison said to him, during the progress of the trial that she would swear to any fact to convict the, prisoner, to the like effect is the testimony of Hendricks; Farrell and Hankins--the former in jail charged with incest, and the latter,

a Deputy U. S. Marshal convicted of manslaughter, because of the killing of a man, while endeavoring to arrest him were in jail with witness Wilson; Hankins and Wilson were in the same prison cell, and had frequent conversations with Wilson about Tucker's case, they swore substantially that witness Wilson told them repeatedly while in jail, that he had no idea who did the shooting; that the shot that took the life of Lula May came from behind, and that Tucker did not do the shooting (Record pages 82-90). These witnesses were not impeached at the trial, according to any of the well known rules of evidence. As to Maxey the court told the jury: "You are to see whether this witness was subpœnæd in the usual way, at the expense of the govornment; you are to see and find out whether he is a *nunc pro tunc* witness." and as to Mattison, Maxey, Hendricks, Farrell and Hankins the court told the jury: "The witnesses Maxey, Mattison, Hendricks, Farrell, and Hankins are swearing to a state of case, *contradicting a solemn statement of the defendant in his application for witnesses*," (Record page 172).

This charge of the court was decisive of what effect the jury would give to their evidence. The force of it was brushed away from the record by such a charge from the learned judge who gave it. It is true Hankins had been tried for murder and convicted of manslaughter, while endeavoring to discharge his duty as an officer. Farrell was in jail charged with the hateful crime of incest, but after-

wards discharged by the court, Hendricks and Mattison were in the employ of two dry goods houses in Fort Smith, and were at court on business, and did not know the prisoner, nor know the trial was in progress when Lillie Ibison talked to them about the case. Not one word occurs in the record as to the character of the government's witnesses. Who were *they!* Wilson had been in two bawdy house troubles in which he was charged as being *particeps criminis* in two murders. Lillie Ibison and Fannie Orwig were plying their adulterous vocation at the little shanty where their companion in guilt died, and the two Wilson girls were sisters of William Wilson. In the language of this assignment the court "failed to comment on the character of these witnesses." Coming from so high a source the jury feeling it their duty to obey the law as given by the court, a conviction of the prisoner was inevitable.

When ever evidence is offered to a jury in its nature *prima facia* proof, its character as such is not to be disregarded, and the court has no right to direct the jury to disregard it; the law submits it to them to decide for themselves and any interference with this right would be an invasion of their privileges to respond to matters of fact.

Crane v. Morris 6 *Pet.* 598.

While the court may sum up the facts in a case, the law should be seperated from the facts left to the jury in

unequivocal terms.

McLanahan v. Universal Ins. Co. 1. Pet. 170,

and in that event the jury should be made distinctly to understand that the instruction was not given as a point of law.

Tracy v. Swartwout 10 *Pet.* 80.
Games v. Dunn 14 *Pet.* 322.

12. The Judge informs this court through his opinion in over-ruling the motion for a new trial, that the witness Maxey was, on account of alleged perjury in this case, convicted and sentenced to hard labor; this case was railroaded through within a very few days after Tucker's conviction. It appears that the jury knew of his arrest, immediately after he left the witness stand. It is not for us to say he was innocent, for the prisoner has never claimed that Wilson did the shooting, but some one from behind him, as stated by Wilson to Hankins and Farrell. This fact, together with a general denunciation of the witnesses by the Court for the defense certainly influed the action of the jury.

13. J. S. Gunn was regularly subpœnæd, and arrived after the argument of counsel had closed, but before the court charged the jury. The court refused to permit him to testify (Record 143--144). Such action was within the sound discretion of the court we admit, but in as much

as his testimony would have shown that the shot that killed Lula May was fired from behind Tucker, and that he had no interest in the case and did not even know him, his testimony tended to acquit the prisoner, but this witness' character did not escape, when the motion for a new trial was over-ruled (Record pages 184-185). It is not to be presumed that counsel would permit an important witness like this one to lie around the Court house, and not be put upon the stand in regular order, and counsel state the fact of his arrival and calling their attention to his presence at the time as shown in his statement (Record page 177), is true If he has committed perjury he is liable to punishment. The affidavit of Gunn was made before an officer authorized by law to administer an oath.

Marshal Tucker, lying in a prison cell, for all these months, patiently and prayerfully awaiting the action of this court on his cause, swore that it was through information of others that he knew of Gunn..

With a firm belief that many reversible errors were committed by the Circuit Court in the trial of this cause, the case is respectfully submitted.

A. H. GARLAND,

Counsel for Plaintiff in Error..

Office Supreme Court U. S.
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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

MARSHAL TUCKER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 970.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

MARSHAL TUCKER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES. } No. 970.

On March 11, 1893, the plaintiff in error, Marshal Tucker, was convicted for murder in the circuit court of the United States for the western district of Arkansas upon an indictment which charged that the said Marshal Tucker, on the 15th day of September, 1892, at the Choctaw Nation, in the Indian country, within the western district of Arkansas, did shoot and kill Lula May, a white woman.

THE CASE.

From the testimony of the witnesses, which is very voluminous, it appears that Marshal Tucker, who lives in the Choctaw Nation, came up to the town of McAlester by rail on the "Choctaw train," reaching there about 7 o'clock on the evening of September 15, 1892. He had been summoned to McAlester to testify as a witness. On

reaching McAlester he went to Wilson's tavern and took supper. After supper, he went, in company with William Wilson, a son of the tavern keeper, up into the town and visited a billiard room and a restaurant; they took several drinks of what they called "cider," when they agreed to walk over to old McAlester, called "Old town," a mile and a half distant from new McAlester, where Wilson's tavern was.

On the way over they agreed to visit a neighborhood known as "Chippy Hill," which was a mile from old McAlester and a half a mile from New or South McAlester. They stopped in front of a house occupied by Lula May, the deceased. In that house at the time were three women, to wit: Lula May, Lillie Ibison, and Fannie Orwick. These women were strumpets. Marshal Tucker in a loud tone demanded admission, and after some talk, which is variously stated by the several witnesses, one of the women moved forward to open the door, which was locked, and admit the men. A shot was fired from the outside, through the door, which struck Lula May on the left side of her head, pretty well in front, killing her almost instantly.

The eye witnesses agree (pp. 8, 33, and 43) that the defendant in error, Marshal Tucker, was found by the surviving inmates of the house, who had rushed out immediately upon the shooting, with a revolver in his hand. And William Wilson, who accompaied him, testified that before the shooting, Tucker had knocked upon the door of the house with this pistol. The woman said to him, "Marshal, you have killed Lula; don't shoot any more." After the shooting the two men went away together and

returned to South McAlester; Tucker returning to Wilson's tavern, and William Wilson going up into the town of McAlester and there getting certain citizens, Messrs. Hooper, Fowler, Lindley, Kilpatrick, and others, and going back to the house where the body of the woman was, and preparing it for burial. A Mr. Neal went down to Wilson's tavern and brought the defendant in error, Tucker, up into the town and turned him over to Willburton, the sheriff, by whom he was put in jail.

Belle Wilson, a daughter of the tavern keeper and sister of William Wilson, testified that Tucker returned to the tavern about 9 or half past 9; that he took a pistol out of his pocket and gave it to her, and she turned it over to Neal when he came to the tavern for Tucker. She says that Tucker talked very little, only talked about his mother; said he was sorry for her. "He told me that he had done the killing" (p. 69). "He said there had been somebody killed down in the town. I think he said there had been a lady killed, and they accused him of it. He said there had been a killing down in town, and they said there had been a lady killed, and they accused him of it" (p. 71). She further testified that Tucker was drunk when he returned to the tavern, but qualified it (p. 73); "that he was not what you would call a drunk man," but had been drinking more when he came back than when he was there at first.

William Wilson, who had accompanied Tucker, testified that he was 6, 7, or 8 steps from the door when the shooting took place. He had been arrested for this crime when Tucker was arrested, but the grand jury had not found an indictment against him.

Tenie Wilson, a sister of Belle Wilson, corroborates Belle's testimony as to so much of the conversation as took place in her presence. She says that she thought that Tucker was drunk and did not know what he was talking about (p. 80).

Marshal Tucker, the defendant in error, testifying in his own behalf (p. 113), said:

> There was a shot fired and I jumped sort of to one side off the step; I did not know where the shot came from, from the inside or outside; I jumped back to my left that way, and Billy Wilson shoved the pistol to me and said, "Here, take that." I did not know he had the pistol until then; I did not know mine was gone until then.

There can be no doubt upon all the evidence that the fatal shot was fired from a pistol in the hands of Marshal Tucker, the defendant in error.

The questions that are presented for the consideration of this court are those that arise upon the assignments of error.

ARGUMENT.

The question arises here which has so frequently been brought to the attention of this court, and upon which, in the case of *Hicks* v. *The United States*, it has recently expressed an opinion, viz: How far the rule that has been prescribed and enforced on civil appeals will be applied in criminal cases as to the manner in which the grounds of error assigned shall be presented upon proper bills of exception.

The fourth rule of this court prescribes that—

> The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

The only statutory regulation concerning bills of exception is found in section 953, Revised Statutes:

> A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto.

In *Hanna* v. *Maas* (122 U. S., 24) this court, all the judges concurring, has stated in distinct and unequivocal terms the object and essential features of a bill of exceptions.

And in *Michigan Ins. Bank* v. *Eldred* (143 U. S., 298) it has reaffirmed these views.

In this case the testimony covers 138 pages and the charge of the court to the jury covers 30 pages. The certificate of the judge, who presided at the trial, to the bill of exceptions will be found on page 186, but it will be seen that there is embraced within this bill of exceptions not only all the testimony and the entire charge to the jury, but all of the proceedings on a motion for a new trial,

with 8 pages of an additional opinion of the court in support of his denial of the motion for a new trial.

It was observed by the judge who delivered the opinion of this court in *Hicks* v. *The United States* that a man should not be hung because of the error of his counsel. Without assuming to criticise to any extent the view there expressed, I venture respectfully to suggest that the latitude which that view extends to counsel for the prisoner affords a method of defense which, if skillfully applied in the preparation of a bill of exceptions, will rarely fail to secure to the prisoner a new trial in any case.

THE ERRORS ASSIGNED.

1. Because the court erred in admitting to be read in evidence by the prosecution the application made by the defendant for witnesses, as follows:

The defendant in error, Tucker, on the 20th day of February, 1893, signed and made oath to an application in writing to have summoned, at the expense of the United States, certain witnesses to—

> Show that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing, and was incapable of forming any design (p. 134).

The defendant in error offered himself as a witness in his own behalf and was shown the paper and acknowledged it. He declares that he was not drunk on the occasion of the homicide; that he was sober enough to know what he was doing; that he knew everything that was going on (pp. 119, 122); and W. B. Pape, who was

deputy clerk of the court, testified (pp. 141, 142) that he, at the instance of defendant's counsel, had presented that paper to defendant and had read it over to him, and after some corrections had been made in the paper, at the instance of defendant defendant had then signed and sworn to it. After all this evidence had gone to the jury, the district attorney offered the paper itself in evidence before them as a direct impeachment of defendant's veracity. It is sought to support the objection made to the admissibility of this paper on the ground that it is in violation of section 860, Revised Statutes, which provides that—

> No pleading of a party, nor any discovery or evidence obtained from a party, or witness, by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, etc.

Now, clearly this statute has no application to the question in hand. It was intended to prevent a man from being forced to testify against himself in any manner, unless he chose to present himself as a witness in his own behalf. Here the prisoner did present himself as a witness in his own behalf, and stood then just as any other witness, and, as any other witness, was liable to impeachment by any voluntary declaration which he had previously made, whether written or oral.

2. In admitting incompetent testimony on part of the prosecution to go the jury.

No specification is made under this assignment of the testimony alleged to be incompetent, and it is impossible to know what is referred to here, unless, indeed, we explore

the entire 138 pages of testimony to discover such possible grounds of error in the admission of testimony as may exist there.

3. In refusing to instruct the jury as requested by the defendant as shown by his request for instructions set out in the bill of exceptions (p. 187).

That request for instruction related to the alleged intoxication of the defendant in error, and the charge of the court (pp. 161–167) clearly and accurately states the law on this subject and states it in such a manner as to secure the intelligent apprehension of it by the jury.

The learned judge has taken up each of these assignments of error on the motion for a new trial and his disposition of them will be found on pages 179–186.

4, 5, 6. These relate to the charge of the court to the jury, and the first and conclusive reply to them is that they are not true. No such instructions as are alleged in these assignments will be found anywhere in the charge delivered by the court.

7. In commenting to the jury, urging them to perform their duty, and in commenting upon the crime of murder and its frequency in the Indian Territory.

If any such comment was made by the court, it nowhere appears in this record.

8. In instructing the jury as to the law of murder and as to malice in murder as shown in instructions given by the court.

It is impossible to know just what is referred to in this assignment. No specific portion of the charge is quoted or pointed out or designated in any manner, but this court

is invited to take up this charge of 30 pages and search for error, which counsel for defendant appears to have been either unable or unwilling to discover.

Judge Parker justly complains of the injustice of such a course.

9. As to the definition of manslaughter, etc.. Section 5341, Revised Statutes, defines manslaughter, and this objection is best met here by referring to the charge itself (pp. 160–161) and to the judge's statement (p. 181).

10. In instructing the jury as to the law of intoxication and the effect of it upon the act of the defendant, etc.

Whether this means, as it plainly states, that the error consists in instructing the jury at all on this subject, or in giving them an erroneous instruction upon it, is left in doubt; but there can be no doubt that the law as delivered by the court (pp. 162–167) was correctly and fairly stated, with such an abundance of illustration and clearness of exposition as to leave the jury free from doubt as to the law.

11. In commenting unfavorably upon defendant's witnesses, etc., and in saying to the jury as to George Maxey's testimony:

> You are to see whether this witness was subpœnaed in the usual way at the expense of the Government. You are to see whether he is an *ex post facto* witness; you are to see and find out whether he is a *nunc pro tunc* witness.

And in saying to the jury that—

> The witnesses Maxey, Matterson, Hendrix, Ferrell, and Hankins are swearing to a state of case contradicting the solemn sworn statement of the defendant in his application for witnesses.

A thorough examination of the charge as it appears in the record fails to disclose anywhere the language quoted in the assignment of error. Indeed, as to the statement alleged to have been made as to George Maxey, the language of the judge will be found on page 171, and neither in expression nor meaning will it justify the construction placed upon it.

As to the comments by the court upon the testimony of the witnesses, this court has said in *Simmons* v. *United States* (142 U. S., 148), on an indictment charging the defendant with embezzling the funds of a certain national bank:

> And it is so well settled by a long series of decisions of this court that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact, which he submits to their determination, that it is only necessary to refer to two or three recent cases, in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. (*Vicksburg, etc., R. R.*, v. *Putnam*, 118 U. S., 545; *United States* v. *Phila. & R. R. R.*, 123 U. S. 113; *Lorejoy* v. *United States*, 128 U. S., 171.)

12. In directing Deputy Marshal White to arrest the witness George Maxey before he left the witness stand, and in having him arrested by said White as he went out of the door of the court room, and taken off to jail in the presence of the jury.

If this, or any part of it, occurred, we have been unable to find it anywhere in the record; and the only reference

to it will be found on pages 183–184, in the opinion of Judge Parker in overruling the motion for a new trial on this ground; and in that opinion he denies the statement as it appears in the assignment of error, and states the facts as he says they actually occurred. And as that opinion forms a part of the bill of exceptions, the statements contained therein must be accepted by this court as a certificate of facts. And in that view the answer to this assignment of error is simply that it is not true.

13. In not granting a new trial on the ground of newly discovered evidence.

This court has repeatedly held that a refusal to grant a new trial can not be assigned as error here, but rests within the discretion of the trial court. (*Railway Co.* v. *Heck*, 102 U. S.. 120.)

These are all the errors assigned in this record on which the plaintiff in error relies to reverse the judgment of the court below. They have been so fully and directly met in the opinion of the judge in the court below, on the motion for a new trial, that argument here is only needed to comply with the rule, which requires a brief to be filed. Error may exist somewhere in this record; it may be detected and exposed under the jealous scrutiny of this court. We have not felt it to be our duty, however, to endeavor to anticipate and meet by argument any other error than that which has been pointed out in the assignments.

HOLMES CONRAD,
Assistant Attorney-General.

151 U.S. 171

151 U.S. 171

RECORD, CASE NO. 14036.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. ~~348~~. 106

JOHN CADWALADER, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JOHN E. F. ZEH, FREDERICK EBELING AND THEODORE REUSS, TRADING AS ZEH, EBELING & REUSS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 16, 1890.

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1 UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA, *set.*

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between John E. F. Zeh, Frederick Ebeling, and Theodore Reuss, trading as Zeh, Ebeling and Reuss, plaintiffs, and John Cadwalader, collector of customs for the district of Philadelphia, defendant, in a plea of assumpsit, a manifest error has intervened to the great damage of the said John Cadwalader, collector of customs for the district of Philadelphia, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this third day of December, A. D. one thousand eight hundred and eighty-nine, and in the one hundred and fourteenth year of the Independence of the said United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To John E. F. Zeh, Frederick Ebeling, and Theodore Reuss, trading as Zeh, Ebeling and Reuss, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania in the third circuit, wherein John Cadwalader, collector of customs for the district of Philadelphia, plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this sixth day of December in the year of our Lord one thousand eight hundred and eighty-nine.

WM. BUTLER, *Judge.*

I accept service of the above citation for John E. T. Zeh, Frederick Ebeling, and Theodore Reuss, trading as Zeh, Ebeling and Reuss, and request the clerk of the Supreme Court to enter my appearance as attorney for said defendants in error

FRANK B. PRICHARD.

Dec. 10, 1889.

(Indorsed:) 33. April sess., 1888. U. S. C. C. Zeh et al. vs. Cadwalader, coll. &c. Citation. John R. Read, U. S. atty.

3 In the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit.

JOHN E. F. ZEH, FREDERICK EBELING, AND Theodore Reuss, trading as Zeh, Ebeling and Reuss,	No. 33. April sess., 1888.
vs.	
JOHN CADWALADER, COLLECTOR OF CUSTOMS for the district of Philadelphia.	

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1888, No. 33. It is thus contained:

Be it remembered that on the 22nd day of May, A. D. 1888, the plaintiffs, by their attorney, Frank P. Prichard, esq., came into court here and sues therefrom a writ of summons against John Cadwalader, collector of customs for the district of Philadelphia, which with the endorsement and return thereto is in the words and figures following, to wit:

4 UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA, *set.*

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you summon John Cadwalader, collector of customs for the district of Philadelphia, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same, court to be holden at Philadelphia, on the first Monday of June next, to answer to John E. F. Zeh, Frederick Eberling, and Theodore Reuss, trading as Zeh, Eberling and Reuss, in a plea of assumpsit, and have you then there this writ.

Witness the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, at Philadelphia, this 22nd day of May, A. D. 1888, and in the 112th year of the Independence of the United States.

SAMUEL BELL,
Clerk of Circuit Court, U. S.

5 (Indorsed:) No. 33. Circuit court, April session, 1888. Zeh et al. vs. Cadwalader, collector, &c. Summons. Assumpsit. Returnable on the first Monday of June next. Frank P. Prichard, attorney for plaintiff. Filed May 31, 1888.

I accept service of the within writ, and request John R. Read, esq., U. S. dist. attorney for E. dist. of Penna., to enter an appearance for me.

JOHN CADWALADER,
Collector of Customs, District of Philadelphia.

6 And afterwards, to wit, on the 22nd day of June, A. D. 1888, the plaintiffs, by their attorney, Frank P. Prichard, esq., come into court here and file their statement of demand, which, being read, is as follows, to wit:

JOHN E. F. ZEH, FREDERICK EBELING, AND Theodore Reuss, trading as Zeh, Ebeling and Reuss,
vs.
JOHN CADWALADER, COLLECTOR OF CUSTOMS for the district of Philadelphia.
} U. S. C. C., April sess., 1888, No. 33.

Statement of plaintiffs' demand.

The plaintiffs claim to recover from the defendant moneys paid under protest by the plaintiffs to the defendant as collector of customs for the district of Philadelphia, as duties, in order to obtain possession of merchandise imported for the plaintiffs, which moneys were demanded and collected by defendant in excess of the amount of duties authorized by law. Annexed hereto and intended as part of this statement is a bill of particulars showing the dates and amounts of such payments in excess. Plaintiffs aver that there is now due and owing by the defendant the full amount of such payments as shown by said bill of particulars with interest from their respective dates.

FRANK P. PRICHARD,
Attorney for Plaintiffs, per C. E. W.

7 *Bill of particulars—Name of importer (for all the importations), Zeh, Ebeling and Reuss.*

	Description of goods.	Name of vessel.	Whence imported.	Date of invoice.	Amount of duty illegally exacted.	Date of entry at custom-house.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.	
				Dec. 21, 1887							
				" " "							
1	Toys	Lord Gough	Liverpool	" 29, "	$167.50	Jan. 20, 1888	Jan. 21, 1888	Feb'y 2, 1888	Feb'y 2, 1888	Feb. 29, 1888	3979 R.
2	"	Br Princess	do	Jan. 31, 1888	35.00	Feb'y 20, "	Feb'y 23, "	Mar. 21, "	Mar. 21, "	Ap'l 27, "	386 S.
3	"	Vaderland	Antwerp	Jan. 28, "	88.00	" 21, "	" 24, "	" 19, "	" 19, "	" 24, "	318 S.
				11, "							
				9, "							
4	"	Lord Gough	Liverpool	Feb'y 1, "	34.00	" 28, "	Mar. 1, "	" 21, "	" 21, "	" 27, "	387 S.
					324.50						

8 (Endorsed:) No. 33. April sess., 1888. U. S. C. C. Zeh et al. v. Cadwalader, collector, &c. Statement of plaintiffs' demand, filed June 22, 1888. Frank P. Prichard, attorney for plaintiff.

And afterwards, to wit, on the 28th day of August, A. D. 1888, the defendant, by his attorney, comes into court here and files his plea, which, being read, is as follows, to wit:

9 In the circuit court of the United States for the eastern district of Pennsylvania. In the third circuit.

JOHN E. F. ZEH, FREDERICK EBELING, AND Theodore Reuss, trading as Zeh, Ebeling and Reuss, *vs.* JOHN CADWALADER, COLLECTOR OF CUSTOMS for the district of Philadelphia.	April sessions, 1888, No. 33. Summons. Assumpsit.

And the said defendant, by John R. Read, esquire, his attorney, comes and defends the wrong and injury, when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiffs, John E. F. Zeh et al. above thereof complained against him, and of this he puts himself upon the country.

JOHN R. READ,
per B.,
Attorney for Defendant.

(Indorsed:) No. 33. April sessions, 1888. In the circuit court of the United States for the eastern district of Pennsylvania. In the third circuit. John E. F. Zeh et al. vs. John Cadwalader, collector. Plea of defendant. Filed August 28, 1888. John R. Read, attorney for defendant.

10 And thereupon it is ordered that a jury come to try the issue joined in this case.

And afterwards, to wit, on the 10th day of October, A. D. 1889, come the parties aforesaid, and the jurors of the jury aforesaid, being called, likewise come, to wit:

1. William Fry;
2. Henry W. Broadhead;
3. Lewis C. Thompson;
4. Abraham Fortenbaugh;
5. John Campbell;
6. Samuel W. Hess;
7. J. Henry Jahke;
8. Henry C. Potter;
9. T. Howard Atkinson;
10. Roswell G. Feltus;
11. Elias Biltner;
12. William S. Grant;

who are duly empanelled, returned, chosen, tried and sworn or affirmed to speak the truth in the issue joined in this case.

And afterwards, to wit, on the 15th day of October, A. D. 1889, the jurors aforesaid, upon their oaths or affirmations, respectively, do say that they find for the plaintiffs and assess the damages at three hundred and fifty-five $\frac{80}{100}$ dollars ($355.80).

11 And afterwards, to wit, on the 17th day of October, A. D. 1889, the defendant, by his attorney John R. Read, esq., comes into our said court here, and files a motion for a new trial, with reasons, which, being read, are as follows, to wit:

ZEH ET AL.,
vs.
CADWALADER, COLLECTOR. } U. S. C. C., April sessions, 1888, No. 33.

Motion and reasons for a new trial.

And now, to wit, Oct'r 17th, 1889, the above defendant, by counsel, moves the court for a rule to show cause why a new trial should not be granted, and assigns the following reasons:

1. The learned court erred in overruling the objection made on behalf of the defendant in the admission of certain catalogues circulated in trade by the houses whose names they bore as to earthenware articles.

2. The learned judge erred in refusing the defendant's offer to show that in the toy shop of Mr. Schwartz, in Philadelphia, on Chestnut street, above 10th, the articles put in evidence by the plaintiff were not sold as toys.

3. The learned judge erred in refusing the defendant's offer to
12 show that, upon inquiry made by a witness at the Schwartz toy store for the production of articles similar to those in suit, the response was given him that they did not keep such articles, but only children's toy tea sets, and offered to produce him tea sets similar to those produced by the defendant.

4. The learned judge erred in refusing an offer to prove that a visit was made to the establishment of Frymier and Edwards preceeding the trial (Mr. Frymier having been called as a witness for the plaintiff), and that Mr. Edwards had said that the articles in suit were not bought and sold as toys, the offer being coupled with an offer to show that several unsuccessful attempts had been made by the defendant to subpœna Mr. Edwards, who was reported to be out of the city.

5. The learned judge erred in his answer to the 3rd point of the defendant, as follows: If you believe that the articles in question are known as earthenware in trade and are chiefly used as other articles of earthen, stone, and crockery ware are used and are not chiefly used as playthings for children, then your verdict should be for the defendant.

13 6. The learned judge erred in his answer to the defendant's 8th point, as follows: Upon the evidence in this case, the term "toys" should not be given any technical, or particular, or commercial meaning, but should receive its popular signification and natural import, and if the articles in question are not "toys" in the popular and general sense of the term, but are used for ordinary household purposes like the other articles of earthenware, and if such use is predominating and not exceptional, then your verdict should be for the defendant.

7. The learned judge erred in his answer to the defendant's 9th point, which is as follows: Under section 2499, as amended by the last tariff act, if two or more rates of duty be applicable to any imported article, it shall be classed for duty under the highest of such rates, so that if you

find that the articles in suit are earthenware decorated, then your verdict should be for the defendant, even if you also find that they are toys.

8. The verdict was against the evidence.
9. The verdict was against the weight of the evidence.
10. The verdict was against the law.

W. W. CARR,
Ass't U. S. Att'y.

14 (Endorsed:) 33. April S., 1888. U. S. C. C. Zeh et al. vs. Cadwalader, collector, &c. Motion and reasons for a new trial. Filed October 17, 1889. John R. Read, U. S. att'y.

And afterwards, to wit, on the 23rd day of October, A. D. 1889, this cause, coming on for argument on motion for a new trial, and having been argued by counsel for the respective parties, and having been duly considered by the court, it is ordered that the motion for a new trial be and the same is hereby denied; and it is further ordered that judgment be entered on the verdict in favor of plaintiffs and against the defendant.

Whereupon judgment is entered accordingly.

15 In the circuit court of the United States for the eastern district of Pennsylvania of April sessions, 1888.

ZEH ET AL.
vs.
JOHN CADWALADER, COLLECTOR OF CUSTOMS for the district of Pennsylvania. } No. 33.

Be it remembered that in the said term of April, A. D. 1888, came the said plaintiffs into the said court, and impleaded the said defendant in a certain plea of trespass on the case, &c., in which the said plaintiffs declared (prout narr), and the said defendant pleaded (prout pleas), and thereupon issue was joined between them;

And afterwards, to wit, at the session of the said court held at the district aforesaid, before the honorable William Butler, judge of the said court, on the tenth day of October, A. D. 1889, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly empannelled (prout list of jurors), at which day came as well the said plaintiffs as the said defendants, by their respective attorneys, and the jurors of the jury aforesaid empannelled to try the said issue, and upon the trial the counsel of the said plaintiffs, having opened the cause for the Government, offered the following testimony:

16 EDWARD J. COLLINS, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. You are clerk in the custom-house?
A. Yes, sir.
Q. These are the entries and invoices in suit, are they not?
A. They are.
Q. And there have been due protest and appeals made?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

17 Q. The red ink marks on these invoices show the action of the Government official in making these appraisements?

A. Yes, sir.

J. A. E. F. ZEH, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. Of what firm are you a member?

A. I am a member of the firm of Zeh, Ebeling & Reuss, the plaintiffs in this suit.

Q. What is the business of that firm?

A. We import china, glass ware, fancy goods, and toys.

Q. How long have you been engaged in that business yourself, either as member of this firm or other firms?

A. About thirty years and over.

Q. Is there a class of articles in your business composed of cups, saucers, plates, and mugs, which are known in the trade as toys and intended for the amusement of children?

A. There is; yes, sir.

Q. Please state in what form or forms these things come.

A. They sometimes come cups and saucers alone, sometimes cups,
18 saucers, and plates together, sometimes they come in tea sets, complete sets, the mugs come separate and the plates come separate.

Q. How are they designated in the trade?

A. They are designated as toys.

Q. For instance, where they come together as complete sets what would you call them?

A. Toy tea sets.

Q. How are they known if they come in plates alone?

A. Toy plates.

Q. How are they known if they are mugs alone?

A. Tea cups or tea cans.

Q. How if they come in cups and saucers alone?

A. Toy teas.

Q. Have you catalogues of various manufacturers here and abroad containing an enumeration and description of these articles?

A. Yes, sir.

Q. Those are the catalogues that you have there?

A. Yes, sir; those are the catalogues.

Q. What are the names of the firms who issue them?

A. This is a general English price list.

Q. By whom is that issued?

19 A. I think it is issued by an association of maunfacturers.

By the COURT:

Q. They are known to you as dealers?

A. They are manufacturers. We buy from the manufacturers alone. This is one of Knowles, Taylor & Knowles, East Liverpool, Ohio. This is Burroughs & Markwood, Trenton, New Jersey. This is Morris Pottery Company, Beaver Falls, Pennsylvania. Here is one Brown Pottery Company, England.

Q. They are from houses—places that manufacture?

A. They are all manufacturers. Also Dale & Davis.

The DISTRICT ATTORNEY. I object to the introduction of these circulars.

The COURT. You want to show that there are such things known to the profession as toy plates, toy tea sets, etc.

Mr. PRICHARD. That is the object of my offer.

The COURT. I suppose there will be testimony here to show that these things are toy plates and toy sets, and then of course the statements contained in these circulars will be referred to that testimony. It is
20 to show that there are articles in trade called toy tea sets, toy cups, saucers, &c.

The DISTRICT ATTORNEY. I except to the evidence because there is no evidence that this book is published by the Brown Hill Pottery Company.

The COURT. Let the testimony go further and show that these catalogues are circulated in the trade and accepted as issued by this house.

By Mr. PRICHARD:

Q. Are or are not these catalogues circulated in the trade by the houses whose names they bear and accepted as catalogues of goods?

The COURT. And goods ordered accordingly?

A. Yes, sir.

The COURT. Then I will overrule the objection and give the Government an exception.

(Exception on behalf of the Government.)

By Mr. PRICHARD:

Q. I find on these invoices 140 dozen toy mugs printed assorted. That is invoice No. 2568 by the steamship "Lord Gough." Have you such samples here?

A. Yes, sir. (Producing mugs). That is one of the toy mugs.

21 Q. I find here forty dozen of toy cans, gold and marble. Is that one of them (producing samples)?

A. Yes, sir.

Q. Three hundred dozen toy teas, invoice No. 2196, steamship "Faderland." Those are the ones referred to, are they not (producing samples)?

A. Those are the toy teas and those are the toy plates.

Q. 150 dozen toy muffins, invoice 2568, by steamship "Lord Gough"?

A. Those are the toy muffins.

Q. Without going into the invoice, are those also toy cans which are included in this invoice?

A. Yes, sir.

Q. Is there anything else here that should be included in the invoice?

A. No, sir; those cover the goods included in the invoice (referring to samples).

Q. Are or are not these mugs included and dealt in and known in the trade under the denomination of toy cans or toy mugs?

A. They are.

Q. To whom are they sold and what is their use?

A. We sell them in the great part to the toy dealers.

Q. What is their purpose?

22 A. Their purpose is for children to play with them.

Q. In reference to these plates, what is their designation in the trade?

A. Toy plates.

Q. What is their purpose?

A. Their purpose is for children to play with.

Q. To what class of persons do you sell them?

A. We sell them in a great many cases to toy dealers and also to china stores.

Q. To china stores that deal in what class of articles?

A. That deal in toys, too.

Q. Do or do not retail stores occasionally deal in fancy goods and toys as well as wholesale stores?

A. Yes, sir.

Q. What is the cost of these plates? How do they compare with the cost of plates which are used for ordinary purposes of plates?

A. Those plates are very cheap; we sell them at $6 a gross.

Q. That is how much a dozen?

A. Fifty cents a dozen.

By the COURT:

23 Q. What would be the price of an ordinary plate of the same quality.

A. A plate of the same quality would be of the same price.

By Mr. PRICHARD:

Q. Do they make the ordinary plates for the table of the same quality?

A. Not exactly.

Q. Who makes this toy ware usually in the factories?

A. The apprentices.

Q. Is it or is it not true that the defective or the crooked pieces, where they can, go into the toy ware?

(Objected to.)

Q. What experience have you had in the manufacture of these articles?

A. I have had no experience in the manufacture, only I go and see the manufacturers every year. I am there every year to see them.

Q. You have been in the manufacturers' establishments frequently?

A. Yes, sir; every year I go there.

Q. Are you familiar with the method or quantity of these plates?

A. Not exactly.

Q. Explain what you mean?

24 A. I feel interested and look at them and see them making them.

Q. You have had no practical experience in making them yourself?

A. No, sir; I have not.

Q. The cups and saucers; what are they known in the trade as?

A. Toy teas and plates.

Q. For what purpose are they used?

A. They are used for children to play with.

Cross-examination by the DISTRICT ATTORNEY:

Q. These circulars that you speak of; did you receive these yourself or were they given to you by some one else?

A. I do not call these circulars; I call them price lists.
Q. Whatever they are. Price lists.
A. Some of those I got myself.
Q. Please take the ones that you got yourself.
(The witness did as requested.)
Q. Those two you have received yourself?
A. Yes, sir.
Q. From whom did you receive them?
25 A. One from the Brown Hill Pottery Company and one of those I bought in the pottery. I received one just like it. I can't say exactly that one. I have not marked it.
Q. How do you know this came from the Brown Hill Pottery Company?
A. Because I got it there in person.
Q. Through the mail or in person?
A. No, sir; in the place; in the pottery.
Q. Do you remember when it was that you received these from the Brown Hill Pottery Company?
A. I do not remember; but I can get one every year if I want it.
Q. When did you receive these?
A. I do not remember.
Q. The date here is in 1883. Was it the spring or fall of the year?
A. I could not tell you; I do not know.
At one o'clock the court took a recess until two o'clock.

26 2 p. m.

By the DISTRICT ATTORNEY:

Q. We were speaking of the price lists that you have produced here. I show you price list that is Knowles, Taylor & Knowles', at page 14. Please look at that and state whether or not the articles included in that price list are any smaller than these samples of goods that you have imported; I mean these mentioned on page 14—creams, slop bowls, sugars, tea sets?
A. There are no creams there, and there are no slop bowls there, and no sugars or tea sets there. I have never seen any of those in Taylor's goods, so I could not tell.
Q. Of course, when you speak of the tea set that is noted here on page 14 you can tell from the price ($1.75) whether it is larger or smaller than the articles that you have put in there?
A. We have no tea sets here; we are not disputing about any tea sets.
Q. I am speaking of the plates, the saucers, and cups; these things that you have produced here. From that price that you noted ($1.75
27 per gross) will you state whether or not the article noted on that price list is larger or smaller than that cup belonging to that?
A. There is no article here for $1.75 a gross; $7.50 a gross.
Q. No; there is $1.75.
A. That is tea set.
Q. I am speaking of the cups and saucers that are found in that tea set. Can you not tell us from your knowledge of your business whether the cups and saucers in that tea set are larger or smaller than these cups and saucers?

A. They are about the same size.

Q. Give me the price of this cup and saucer?

A. Fifty cents a dozen.

Q. As the tea set of twenty-four pieces is mentioned in this price list as $1.75, is it per gross?

A. No, sir; not per gross. It says, "Tea set, twenty-four pieces, handled, $1.75." It don't say per gross.

Q. In this price list you will notice on page 14 the word "toy ware." There are different names given to the different wares. Are there not different china wares or earthen wares in your business?

28 A. I do not understand what you mean.

Q. Is there not a ware that you know as stoneware. That is a peculiar kind of ware, is it not?

A. Yes, sir.

Q. There is also another ware you know in your business as granite ware, is there not?

A. Yes, sir.

Q. State whether or not this is not known in your business as toy ware?

A. It is known as earthenware and toy ware both.

Q. That is what your price list says, toy ware?

A. Yes, sir.

Q. I show you also the price list you have produced, Maire Pottery Company. Look at this, page 10, and state whether or not the plates that are mentioned there as under the head of toy ware are larger or smaller than these plates you have produced here as being in this importation.

A. These plates that are mentioned here under the head of toy ware are smaller.

Q. I presume also, under the head of toy teas, the plates are also smaller under that head, as you judge from the prices, than these articles?

29 A. I do not suppose the teas are any smaller because it does not give any size here. The teas are made in different sizes.

Q. You cannot tell because there is no price given?

A. The price is given there.

Q. Why is it that you do not know whether they are larger or smaller?

A. Because the manufacturers have one price whether they are larger or smaller. Sometimes they are a little larger and sometimes a little smaller.

Q. I show you also the price list you have produced of the Burroughs & Mountford. Look under the title toy ware, and state whether the plates from the price last given there are larger or smaller than these plates that you have produced here?

A. I could not tell it because they do not say what size they are.

Q. You could not tell from the price?

A. No, sir.

Q. You also deal in the ordinary article of china or earthen ware, used for household purposes, in your establishment?

A. Yes, sir.

30 Q. I understood you to say you dealt in fancy articles too, do you not?

A. Yes, sir.

Q. Please state whether or not, from your knowledge of the use of these articles, whether a child could not use these articles as much for the ordinary household purposes as for amusement? (Showing witness cup and saucer.)

A. The child could use it for anything it pleases. He could drink out of it if he choose to do so.

Q. For instance, among fancy articles, do you sell fancy articles to druggists?

A. We do; yes, sir.

Q. The fact that you sell them to druggists does not make these fancy articles necessarily drugs, does it?

A. It is not a drug; no, sir.

Q. So the mere fact that you sell these articles to toy dealers does not make them necessarily what we know as toys under the tariff act, for instance, or dolls and toys, does it?

A. I do not understand what you mean.

Q. I understood you to say in your examination in chief that you always sold these articles to toy dealers?

31 A. Not always. I sell to other people, too.

Q. As a rule, I understood you to say your trade was with the toy dealers?

A. Yes, sir.

Q. Therefore I presume you mean to say from that that these are toys?

The COURT. He has not said that. If he said it, it would mean nothing unless he said that was the trade designation. He has simply stated how he dealt in these.

By the DISTRICT ATTORNEY:

Q. The knowledge that you have of the use of these articles by children. From what does that come? You have stated that they were used by children as playthings?

A. I have seen them play with them.

Q. Have you not also seen them use them as other articles of china are used, for eating?

A. No, sir; I have not seen that.

Q. Your own experience is no better or worse than the experience of other people who are here as to what the chief use of these articles is?

A. No, sir.

32 Q. I notice upon the invoice No. 782, "Lord Gough," this entry "120 toy tea sets, twenty-four pieces, 753 M blue." That does not refer to any of these samples that you have brought here?

A. No, sir.

Q. Please describe what that was.

Q. These were toy tea sets.

Q. What is a toy tea set?

A. A toy tea set is composed of a tea pot, sugar, cream a bowl, six toy cups, six toy saucers and six toy plates.

Q. Cups of this size? (Showing sample to witness.)
A. About like that.
Q. Nothing like this? (Set in box.) Is that or is that not a toy tea set?
A. That is a toy tea set.
Q. Say whether the toy tea set that is mentioned in this invoice that I have referred to was of that size or not?
A. They were larger.
Q. Was it of this size? (Showing another set in box to witness.)
A. They were larger.
33 Q. What is that? (Showing another box to witness.)
A. That is a toy tea set.
Q. How about this? (Another box.)
A. That is a toy tea set.
Q. Was it larger than this?
A. Yes, sir; it was considerably larger.
Q. In what form were these one hundred and twenty tea sets imported? Were they imported as you see these?
A. No, sir.
Q. They were imported how?
A. Loose. Packed loose in hogsheads?
Q. Just like any other china?
A. Yes, sir.
Q. Look at these price lists that you have produced, and from looking at them and their prices, and then looking at the quality of these samples (Government samples), will you say whether or not these are what are known as toy ware?
A. They are toy tea sets.
Q. Are they or are they not known as toy ware?
A. They are not earthen ware at all. They are china.
Q. Are they known as toy ware?
A. They are toys.
Q. You have said that this sample was toy ware?
34 A. I said they were toys.

By the COURT:

Q. You said they were toy ware?
A. They are toy ware. So is the other.

By the DISTRICT ATTORNEY:

Q. This is also toy ware?
A. Yes, sir.
Q. They are what would be responded to if the order was made under this head of toy ware in price lists similar to this?
A. Yes, sir. Those are larger. Those are considerably larger. Those are china and these are earthen ware.
Q. Look at these cups marked "Faderland" February 23d, 1886. What is the size of that cup in your trade?
A. Toy size.
Q. Has it no other name than that?
A. Toy tea. That is the only name.
Q. No other name than that?

A. No, sir.
Q. Is it not sometimes called "Norfolk"?
A. No, sir. Norfolk is a larger cup than that.
Q. Have you any samples of a Norfolk cup here?
A. I have not.
Q. Is it of this shape?
35 A. The shape is different.
Q. What is the shape of a Norfolk cup?
A. The Norfolk is the size only. The shape is different. The shapes of the cups differ.
Q. You understand the Norfolk to be the size?
A. Yes, sir.
Q. The shape of a Norfolk is this shape?
A. No, sir; it does not need to be that shape. It can be any shape.
Q. There are also Norfolk toys, are there?
A. Yes, sir; they are called toys and Norfolk toy teas.
Q. I want you to give me a sample of a Norfolk toy tea. I understand you to say that is not a Norfolk toy tea.
A. I haven't got one here.
Q. I show you this invoice again, No. 782, Lord Gough, and I ask you to look at this item, "Sixty dozen toy Norfolk teas," and I ask you to note that the entry on that was made under the sixty per cent clause as earthenware. Will you kindly explain, if you call it in your invoice a toy, why you did not enter it as a toy like the other entries that you have made as toys?
A. Because the Government at that time required us to enter
36 the goods as earthenware. We wanted to enter them as toys, but the Government required us to enter them as earthenware. That is the reason.
Q. Note on the same invoice you will find the entry made of toy teas as toys, do you not?
A. Yes, sir; they were smaller.
Q. Then I understand you to say that the reason why you did not enter these as toys, and although they were called toys in your invoice, was because they were too large for toys?
A. The Government did not allow us to enter them as toys. They wanted to exact sixty per cent duty.
Q. I show you invoice 2196, "Fadderland," and I ask you to notice that these goods are invoiced as toy teas, toy plates, toy teas and toy plates, and yet your entry is made under the sixty per cent clause as earthenware. Will you please explain why you did not enter them under the clause of dolls and toys?
A. I have to give the same reason as I did before. The Government wanted to exact sixty per cent duty on them and gave us the opportunity to protest and appeal against them.
37 Q. Was it not because that word "toy" was simply the name of the ware—"toy ware"—plates made of what is known as toy ware?
A. No, sir.
Q. I show you invoice No. 2568, Lord Gough, February 29th, 1888, and ask you to notice the entry of Norfolk teas and Norfolk teas. Please

state from the examination of the invoice what was the difference between the goods noted there as Norfolk teas and the goods noted in this other invoice as Norfolk toy teas.

A. These were larger.

Q. It was not because the ware of these articles noted on invoice No. 782, Lord Gough, which are called sixty dozen Norfolk toys, was what is known as toy ware?

A. No.

Q. That was not the reason?

A. No.

Q. There are articles which have a useful purpose for children made of earthenware that are not toys?

A. They can use them. They can make practical use of them.

Q. The question is: Do you make any distinction in your mind between an article made for a child's use and an article made for a
38 toy for a child? Do you make any distinction between the two?

A. Do you mean whether a plaything or a useful article?

Q. Yes.

A. I will have to say to that that a plaything can be made a useful article.

Q. I want to know whether you, in making your statement to this jury, make any distinction as to whether an article is used as a toy or whether it is used for a useful purpose? Do you make any distinction at all, or do you consider them all as one?

A. I consider them all toys. They are for the amusement of children.

Q. Where a cup is used to administer milk to a child it serves a useful purpose, does it not?

A. That is a useful purpose; but if the cup is made for the amusement of the child I call it a toy.

Q. Take this cup, for instance. That can be used to administer milk to the child, can it not?

A. Certainly.

Q. Do you make any distinction between an article like this, that is used for the purpose of administering milk to the child, and an article like this [referring to samples], that serve to amuse it, or do you call those all children's toys?

39 A. I call them all children's toys; they are made for the amusement of children.

Redirect examination by Mr. PRICHARD:

Q. Do I, or not, understand you that if the cup is made, not for the amusement of the child, but for the use of the child, it is not called a toy? I want to know what you call a cup that is made for the use of a child, but not for its amusement.

A. I do not understand.

By the COURT:

Q. Do you know any cups that are made for the use of a child and not for its amusement?

A. Yes, sir; I know of cups.

Q. What are they?

A. They are larger size cups. When a child sits at a table it gets a large cup to drink out of, the same as any grown person.

Q. What kind of a cup?

A. China cup.

By the DISTRICT ATTORNEY:

Q. Like this [showing sample]?

A. No, sir; a better class of goods than those and larger.

40 By Mr. PRICHARD:

Q. The district attorney has carefully called your attention to the items on the catalogue which he thought were of smaller size. I find in one of the catalogues "toy muffins four, five, six, and seven inches;" what is the size of these plates [showing samples]?

A. They are five and six inches.

Q. He has also called your attention to certain small-sized tea sets; how large do toy tea sets run?

A. They run to almost any size; it is very hard to say where toy tea sets end; I have a large box there with a toy tea set in.

By the COURT:

Q. You sell only to the wholesale trade?

A. Yes, sir.

Q. You do not know for what use these are purchased by the retail dealers?

A. No, sir.

By Mr. PRICHARD:

Q. (Showing a large set in box to witness.) Is that a toy tea set?

A. Yes, sir. I also have one of domestic manufacture.

By the COURT:

Q. You deal only in toys, do you?

41 A. Toys and chinaware and earthenware.

Q. Are chinaware tea sets made as small as this?

A. For regular use; no, sir.

Recross-examination by the DISTRICT ATTORNEY:

Q. Not with after-dinner coffee cups?

A. The judge asked me whether toy cups were made as small as this.

Q. Do you mean to say that after-dinner coffee cups are not made as small as any cup you have here?

A. I didn't say that.

Q. You know an after-dinner coffee cup is much smaller than that, do you not?

A. Yes, sir.

Q. Is this what is known in the trade as a cup, saucer, and plate?

A. That is a set; yes, sir.

Q. Those, I understand, are imported in bales or hogsheads?

A. They are imported in large quantities.

Q. And afterwards assorted by you in sets?

A. No; not assorted in sets. For instance, in this case seventy-five dozen in a hogshead.

Q. Do you afterwards sort them into plate, saucer, and cup?

42 A. Exactly. We could not throw them into the shelf at random; we assort them.

Q. When they come here in bales or hogheads, the plates are all packed together in piles?

A. I do not do the unpacking, but I suppose they are.

Q. So with the cups, they are all packed together and you sort them?

A. Yes, sir.

By Mr. PRICHARD:

Q. The same way, I understand also, with the toy tea sets; they also come in hogsheads?

A. Yes, sir.

ANTON WINTERS, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. Toys and fancy goods.

Q. Where is your place of residence?

A. # 822 Arch street.

Q. Are you a manufacturer or importer or dealer?

A. I am an importer.

43 Q. Are you familiar with a class of toys made out of earthenware and include plates, cups, and mugs?

A. Yes, sir.

Q. How long have you been in the business?

A. Since 1860 in the toy business.

Q. Is there or is there not a well-recognized class of goods known in the trade as toy ware?

A. Yes, sir.

Q. I hand you a plate having a pig race on it and a, b, c, &c., around the margin. What do you call that?

A. I call that a toy plate.

Q. Here is another one with some cows and letters around the margin. What do you call that?

A. I call it precisely the same thing. I consider that cheap plates like these would not be used on the table for anything else than a toy. They would not be used by families on the table.

By the DISTRICT ATTORNEY:

Q. They might be used by children at the table?

A. They might be that, but they are generally intended for children to play with. That is what they were manufactured for. I call them toy cups. I have had them in my store and sold them over and over again, and I have sold them as toys.

By the COURT:

44 Q. How does the trade that deals in them designate them in ordering them?

Q. When we order them we order them altogether as toys—toy mugs, toy tea sets. I have toy tea sets as high as $10.

By Mr. PRICHARD:

Q. What do the trade order them as?

A. I am the trade. I order them.

Q. Do you use the ordinary commercial term or not?

A. Yes, sir; that is the regular term. I order them as toy tea sets.

Q. What are these?

A. They are tea sets. I never called them anything but toys, to my knowledge.

Q. In your opinion what in the trade would those be designated?

A. In the toy trade that would be a toy cup and saucer.

Q. Is that a toy plate?

A. That I would consider a toy plate with it.

Q. Is or is not the question of whether a thing is a toy in the trade dependant on its size?

A. No, sir; it has nothing to do with it.

Q. (Large set shown witness.) Did that tea set come out of your store?

45 A. Yes, sir. There you have the very idea. That is nothing else than a toy set. They buy them for their children to play with.

Q. What ware is that? That is pretty fine.

A. That sells at retail for $10. There are higher than those. You can find them at other toy houses, not alone here, but in New York or anywhere.

Q. Do they not range from that size down to this?

(Showing small sample to witness.)

A. Yes, sir; a great deal smaller than that. The smaller ones are a great deal cheaper. From five cents up to five dollars.

Cross-examination by the DISTRICT ATTORNEY:

Q. What is the ware of which these are made?

A. That is earthen ware.

Q. What do you call them?

A. What we call stone or earthen ware.

Q. It is called toy ware. Is it or is it not called toy ware?

A. It is called toy.

Q. When you give an order for so many toy plates, you mean plates made of toy ware?

A. Yes, sir.

46 By the COURT:

Q. Is there any ware for the manufacture of toys that is known as toy ware?

A. I never order them that way.

By the DISTRICT ATTORNEY:

Q. Does this substance out of which they are made differ from the substance out of which other plates and saucers and cups are made?

A. No.

Q. When you speak of toy ware, you mean cups and saucers?

A. Yes, sir.

Q. That is the ware is, the cup and saucer and plate, etc.?

A. Yes, sir.

Q. In the catalogue of the Burroughs, Mountford & Co. works the word "soaps" is used. Suppose you give an order to those works for so many dozen soaps, you would not get what we ordinarily in everyday life use to wash our hands?

A. We would not order those goods that way. We would order the goods to complete the set. We would order so many of one kind. I have my order generally as toy tea sets.

Q. What would you get in response to an order for so many dozen soaps?

47 A. Very likely the very article that you ordered.

Q. That is well known in your business as being an article of earthenware, is it not?

A. Yes, sir. Soaps, I guess, are made of earthenware. It depends upon what kind of goods they are.

Q. You have spoken of the use to which these articles that have been shown you are put, and you spoke of them as being used by children as amusement, for toys. State how you know that.

A. By the sale of those goods and by dealing in those goods so many years.

Q. To whom have you sold them?

A. To the parents who buy them for their children, and they buy them purposely for them to play with, generally. They do not buy those kinds of goods to use in the family. A child can go to the hydrant and drink a glass of water out of them just the same, but that does not alter it from being a toy.

Q. So that you think the chief use to which these articles are put is that of the plaything of the child; is that it?

A. My opinion is that it is made entirely for children.

Q. What is the chief use to which these articles are put; is it as a plaything in your opinion?

A. Yes, sir.

48 Q. Do you sell articles that are entirely for useful purposes?

A. Cups and saucers; yes, sir. I sell some cups and saucers and bisque ornaments.

Q. What seasons of the year do you sell these articles?

A. I sell them the whole year round, because we sell toys the whole year round.

Q. You do not have them especially during a holiday season?

A. No. We only sell this kind of goods to toy-dealers.

Q. Which kind of goods?

A. Those that keep toy stores. We sell to parties who mostly keep toys and different goods, but who keep toys principally.

ALBERT A. BOCKIUS, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. I sell china and glass ware.

Q. With what firm are you connected?

A. A. A. Bockius & Co.

Q. Where is your place of business?

A. 1009 Market st.

49 Q. How long experience have you had in that business?

A. About fifteen years.

Q. Is there or is there not a well-recognized article in that trade known as toys?

A. Yes, sir.

Q. Please look at these plates [handing samples to witness], with the alphabet and pig race, and other pictures, and say what those are.

A. Toy plates.

Q. Look at those mugs and say what they are.

A. Toy cans or toy mugs.

Q. And what are those [indicating]?

A. Toy teas.

Q. What are these [showing samples]?

A. Toy plates.

Q. Is there any difficulty in anybody in the trade knowing what they are?

A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. I understand you to call this a toy [handing plate to witness]?

A. Yes, sir; that is a toy plate.

Q. Do you call it a toy?

50 A. Yes, sir; we sell it as that.

Q. What is the difference between a toy and a toy plate?

A. There is no difference; it is used for a toy.

Q. What do you understand is the difference between a toy and a toy plate?

A. I do not see any difference.

By the COURT:

Q. Except between that and some other kind of toy?

A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. Do you call this cup and saucer a toy?

A. Yes, sir.

Q. Do you call this mug a toy?

A. Yes, sir; toy mug.

Q. Do you call it a toy?

A. Yes, sir.

Q. What do you call the cup and saucer and plate that the child uses at the table?

A. We call it a toy set.

Q. Do you call it a toy?

A. Yes, sir.

Q. You call it a toy whether they play with it or whether they use it for any purpose?

A. Yes, sir.

51 Q. You make no distinction between the two?

A. No, sir.

Q. What are these called when they are made in this country?

A. Toy plates.

Q. For instance, when they are made at the Trenton pottery, what are they called there?

A. I do not know that they make them there.

Q. You know of china factories in this country, do you not?

A. Yes, sir.

Q. What are they called in this country?

A. They do not make them. I haven't seen any toy plates come from them.

Q. What do you call this?

A. A toy tea set.

Q. Do I understand you to say there is no distinction at all between this as a toy tea set and cups and saucers made out of this material and of this size?

A. How do you mean?

Q. Do you say there is no distinction?

A. They are toys.

Q. You call them all toys?

A. Yes, sir.

Q. How soon does it cease to be a toy?

A. Those are always toys.

52 Q. How soon does it cease to be a toy or how do you distinguish one from the other? When does the ware cease to be a toy?

By the COURT:

Q. What is the difference between a toy of that kind and ware of that description that is not a toy?

A. The difference in size.

By the DISTRICT ATTORNEY:

Q. Did you not hear Mr. Winters say the size had nothing to do with it? Do you not know perfectly well that there are numerous coffee cups made for use after dinner which are no larger than that?

A. They are smaller than that; but they are not toys.

Q. Why not?

A. Because they are used for a different use. These are toys.

Q. Have you not seen coffee cups precisely the same size and pattern as that, made for after-dinner coffees?

A. No, sir.

Q. Have you not seen smaller than that?

A. Yes, sir.

Q. What is it that makes a cup and saucer of that size, which is no larger than a size used by an adult, a toy?

53 A. The only reason I know is they are made for toy teas.

Q. Made by whom?

A. Made by the manufacturer.

Q. Is there such a thing known to the trade as toy ware?

A. Not as a ware. The toy is the use for which they are made and to which they are put.

Q. Articles like this come the same as any other china or earthenware, do they not?

A. They come as toys.

Q. They come in the same packages, in crates, or barrels, or hogsheads, do they not?

A. No, sir. We generally buy them in packages loose.

Q. How many? Are you not in the same business as Mr. Zeh?

A. Yes, sir.

Q. Did you not hear Mr. Zeh say these things come in hogsheads?

A. They do come in hogsheads.

Q. You said a moment ago they come in packages?

A. What is a hogshead but a package?

Q. They do come in hogsheads?

A. Yes, sir.

Q. The cups separate from the plates?

A. All are divided into cups, saucers, and plates.

Q. And the hogsheads contained cups, saucers, and plates?

54 A. Sometimes, and sometimes it only has the one.

Q. Are you familiar with the circular of prices of the Burroughs & Mountford Company, Trenton, N. J.?

A. Yes, sir.

Q. Do they not have a certain kind of ware that they call toy ware?

A. Those are white goods usually. They have toys; yes, sir.

Q. Is toy ware composed of only white goods?

A. No, sir. These are printed goods and white goods. You asked me if I saw these goods from Trenton?

Q. No; I did not. I asked you a moment ago whether there was such a thing as toy ware, and you said no. I turned you to the circular of Burroughs and Mountford, Trenton, N. J., and I ask you if there is any such thing on their circular as toy ware. You say, yes; and you say that means white goods. Is that your idea?

A. No, not exactly. The Trenton manufactory manufactures nearly all white goods. There is a toy ware in white, and printed also.

Q. Is there such a thing known to the trade as toy ware?

A. There is not. Not as regards the composition of the manufacture.

Q. Is there such a manufacture known as toy ware; such a product?

55 A. No, sir; not to my knowledge.

Q. What does that mean, stated in the circular?

A. Small size cups and saucers they call toy ware, like earthenware or chinaware.

Q. Do not Burroughs, Montford & Co. have in their circular toy ware, plates, teapots, creams, slops, and toy cans? Then, there is such a thing sold by Burroughs, Montford & Co. as toy ware?

A. They claim to have it.

Q. Have you ever seen it?

A. Yes, sir.

Q. You know what it is?

A. Yes, sir.

Q. What is the difference between the toy ware of Burroughs, Montford & Co. and this ware?

A. The only difference is in the color of the goods.

Q. You do not call this toy ware because it is colored; is that it.

A. I thought you meant in toy ware a special composition of goods made only for toys.

Q. Do you mean to say now that this is toy ware?
A. That is what we call toy ware [referring to cup and saucer].
56 Q. The only difference between this and the ware of the Trenton manufactory is that that is colored and the Trenton is made white?
A. Yes, sir.
Q. That is made in the other country and that is made here?
A. Yes, sir.
Q. White is made in the other country, too, is it not?
A. I have not seen any.
Q. What do you call this toy ware?
A. It is the same thing.

By the COURT:

Q. It belongs to the class of toy ware?
A. Yes, sir. Toys.

By the DISTRICT ATTORNEY:

Q. Is it called toy ware, because it is made for choldren's use?
A. That is the use that we suppose it to be put to.
A. And because it is intended for the use of children, you call it toy ware?
A. Yes, sir.
Q. When you say for the use of children, what do you mean?
A. To play with.
Q. Only to play with? Is that what you mean?
A. Yes, sir.
57 Q. Do you mean to say that these articles made for children's use are only intended to play with?
A. Yes, sir.
Q. Have you any children of your own?
A. Yes, sir.
Q. Do they not use small cups and saucers at the table; the little ones?
A. No, sir.
Q. They do not?
A. No, sir.
Q. They never did use them?
A. No, sir.
Q. Do you not know that choldren at the table always have a small chair, a small fork, and a small spoon?
A. I never had any small ware of that kind.
Q. Do you not know as matter of fact that children have small forks and spoons and chairs?
A. I know that they do.
Q. And that they generally have?
A. I can not say. I only have my own experience on that subject.

58 ALBERT E. SNOW, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?
A. China and earthen ware.
Q. Where is your place of business?

A. I am now with R. & J. Allen & Son, 1124 Market street.
Q. How many years' experience have you had in that business?
A. Seventeen.
Q. Is there, or is there not, an article of commerce, part of your business, known as toy ware?
A. We handle certain articles we call toy ware.
Q. How about those plates [sample shown witness]?
A. That is what we call a five-inch toy plate and a six-inch toy plate.
Q. How about that [sample shown witness]?
A. That we would call a printed toy plate.
Q. What would call that sample [handing sample to witness]?
A. Printed toy cup and saucer.
Q. And what about these mugs [sample shown witness]?
A. Toy cans and toy mugs.

By the COURT:

Q. Why do you call them so?
A. Simply because they have been used in the trade for that for many years.
59 Q. You call them that because they have been called that in the trade.
A. That is what they are used for and sold for; yes, sir.

By Mr. PRITCHARD:

Q. Can you give us any distinguishing characteristics of this class as a whole between classes of goods that are intended for practical use? I would not know, perhaps, how to tell toy ware from other ware. I want to know what are some of the distinguishing characteristics of it.
A. The general quality of the goods. We use a great many of these earthen goods and cheaper goods as toy ware. They are used and imported and handled principally as toys.

By the COURT:

Q. Playthings?
A. Yes, sir.

Cross-examination:

Q. You import yourself direct?
A. Yes, sir.
Q. You have given orders, have you?
A. Yes, sir.
Q. Abroad?
A. No, sir; not abroad.
Q. You buy from importers in this country?
A. Yes, sir.
60 Q. Do you know whether there is an article used in the earthenware trade which is known as toy ware that is different from this article here?
A. There are articles made in this country which are classed under toy ware, the same as other articles would be classed as tea ware or dinner ware, but they are made out of similar material.
Q. These articles would be classed in this country under the head of toy ware too [showing samples to witness]?

Q. In the city of Philadelphia?
A. Yes, sir.
Q. How long have you been in that business?
A. Father has been in it since 1836.
Q. Is there, or is there not, a well known article of commerce known in the trade as toy or toy ware?
A. Yes, sir. Toys generally.
Q. What do you call this [handing sample to witness]?
A. This we buy and sell for toys.
Q. The same way with this [showing sample to witness]?
A. Yes, sir.
Q. These mugs [showing sample to witness]?
A. That is the same.
66 Q. How long have these articles been known in commerce as toys?
A. Ever since I can remember anything about them.

Cross-examination by the DISTRICT ATTORNEY.

Q. Where is your place of business?
A. 47 South Second street.
Q. What kind of goods do you sell mainly?
A. Toys and fancy goods.
Q. Do you deal in china ware?
A. Yes, sir. I buy the stuff and sell it.
Q. What kind of china ware?
A. The same as that. We sell to the trade as toys, and they know it as toys.
Q. How long have you been selling it?
A. I guess for twenty-five or thirty years.
Q. From whom do you buy it?
A. We import ourselves and give import orders besides.
Q. When you order what do you ask for?
A. For china—for toy goods—for goods for the toy trade.
Q. Do you mean to say that is what you say in your order? When you are asking for so many dozen cups and saucers like them, what do you ask for?
A. We give the size.
67 Q. Tell the jury exactly what you order.
A. We order so many gross of this size, and so many of that, and so many of that. When it gets over that we do not consider it a toy set at all.
Q. What do you say in your order?
A. So many dozen cups and so many dozen saucers and so many dozen plates.
Q. That is all you say?
A. Yes, sir.
Q. You do not say anything else?
A. No, sir.
Q. So many dozen cups and so many dozen plates and so many dozen saucers?
A. Yes, sir.

Q. That is all you say?
A. We have other goods we order at the same time.
Q. I mean as to that particular thing?
A. Yes, sir
Q. You speak of the size?
A. Yes, sir.
Q. You do not order it as a toy?
A. Yes, sir. They know it as a toy.
Q. I want to know what you do. You order a cup and a saucer of a certain size, and that is all you say, is it not?
68 A. Yes, sir.
Q. Whom do you give the order to?
A. We give the order direct, or give the order for import.
Q. Do you give it to a manufacturer of sofas and chairs, or do you give it to a china merchant?
A. We give it to a china merchant, of course.
Q. You are clear about that? You send an order to a china merch an to send to you so many dozen cups and so many dozen saucers, etc., of a certain size?
A. Yes, sir. Then we order the tea sets the same way.
Q. When you order toy tea sets, you order these [referring to sample sets]?
A. Yes, sir.
Q. What do you call these?
A. Toy tea sets. They come in different sizes.
Q. When you order a big one like this one [indicating], what do you call it?
A. Toy tea set.
Q. For a long time all these things in boxes made up in little sets for little children to put on their tables and have an imitation tea have been called toy tea sets?
A. Yes, sir.
Q. When you order them, the merchant with whom you deal
69 knows exactly what you mean?
A. He knows what we want.
Q. When you order these materials you simply order them by the size and give the inches in diameter of the plates, saucers, cups, etc.?
A. Yes, sir.
Q. When you order the mugs what do you say?
A. So many toy mugs.
Q. You use the word "toy" for that, do you?
A. Yes, sir. You see our trade is only among the toy dealers.
Q. When you buy this [showing sample to witness] of the china merchant, what do you order?
A. We ask for a toy mug.
Q. Do you ever buy them in this country?
A. Yes, sir.
Q. What do you say to the dealer here when you order them?
A. He shows samples of toy mugs.
Q. When you give that order, you order a toy mug?
A. We order so many and he puts down so many toy mugs.

Q. What ware is that plate [showing sample to witness]?
A. That is common ware.
Q. What is it called?
A. I suppose an earthern ware. We have that in the store, we sell now for toy goods.
70 Q. I am trying to find out what it is.
A. I could not tell you about that. I should judge it was an earthen ware.
Q. If you were going to order that, you would order according to the pattern and size?
A. According to the pattern. I would say pink or brown or blue?
Q. So many gross of pink plates?
A. Yes, sir.
Q. And give the diameter?
A. Yes, sir.
Q. That is all you would say in your order about that, is it not?
A. Yes, sir.
Q. What would you call that [showing sample to witness]?
A. Those we designate as toys.
Q. Suppose you were going to order them?
A. I should order that for toy cup.
Q. Did you ever see anything like that for a coffee cup?
A. No, sir.
Q. Nothing like that?
A. No, sir.
Q. Will you say you have not seen a cup of that size for a coffee cup?
71 A. That we do not deal in. We only deal in ware for toy dealers.
Q. You only deal in such earthenware as will suit what you call the toy trade?
A. Yes, sir.
Q. You are not a dealer in china generally?
A. No, sir.

THOMAS C. ATHERHOLT, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?
A. I am in the china, glass, and queens ware business.
Q. Where is your place of business?
A. 422 Market street. The name of the firm is Thomas C. Atherholt & Co.
Q. How long has your experience been in that trade?
A. About twenty-one years.
Q. Is there, and has there been during that time, a well-known class of goods known commercially as toys?
A. There has always been a line of toys in our business.
Q. What would you call those in your business [showing samples to witness]?

A. I would call this a five-inch a, b, c, toy plate, and the other a six inch.

72 Q. How about that [showing sample to witness]?

A. That is a toy plate.

Q. How about this [showing sample to witness]?

A. A toy tea.

A. And how about these mugs [showing sample to witness]?

A. We call those toy cans or toy mugs.

Q. Is that the commercial name under which they are dealt in?

A. That is what we always call them when we order them.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long have you been importing these things?

A. Probably for ten years.

Q. That will be 1879. Did you get any importations in 1879?

A. I cannot just remember what we made during that year, but about that time—about ten years ago.

Q. Can you remember whether you made any importations similar to these in the years 1878, 1879, and 1880?

A. I cannot.

Q. Or in 1881?

A. I do not think that we made any importations of goods of that kind—not of earthen—but we did I think of china. China toy cups and saucers.

Q. Like these?

73 A. No; the same material as in this little box.

Q. When first do you remember to have imported these things?

A. About 1884; 1885 probably.

Q. Do you sell to wholesale trade or do you sell to retail trade?

A. I sell to the retail trade throughout the country; that is, country stores.

Q. What do you call this cup, saucer, and plate?

A. We call that a toy cup, saucer, and plate.

Q. Is that a set?

A. Yes, sir; that way it is a set.

Q. That is the way you sell that generally, is it not?

A. No; we sell it separate, and that way.

Q. Do you mean the plate as one article?

A. We never sell the plate separate, but we sell the cup and saucer separate, and also the cup, saucer, and plate together.

Q. When you sell them that way you call them a set, do you?

A. Yes, sir; we call them plate sets.

Q. That you call a toy set [small set shown witness]?

A. Yes, sir.

Q. How do these come to you?

74 A. Sometimes we import them with the cups and saucers alone. only packed by themselves in the hogsheads, and sometimes plates are with them. We order them both ways.

Q. After you receive them you assort them as you use them—the cups, saucers, and plates?

A. Yes, sir.

Q. Do you import these goods [also showing sample to witness]?

A. Never import those.
Q. What do you call these?
A. We call them toy tea sets.
Q. What do you call these alone?
A. That would be called a toy cup and saucer. That size are never sold separate from a set.
Q. These are never at any time put to any useful purpose, I presume, are they, by children?
A. I do not think they are.
Q. So far as you know and so far as your knowledge goes what would you say of them?
A. So far as I know, they are not.
Q. How about this; is that ever put to a useful purpose [showing sample to witness]?
A. That I cannot say; we sell them as toys; toy cups and saucers.
Q. I did not ask you how you sold them; I ask you how they are used.
75 A. I can not tell that.
Q. In your knowledge and in your experience of this business do you mean to say you can not say how they are used?
A. I can not say how they are used.
Q. You do not know that they are used as toys, do you?
A. I only say they are imported as toys. When we give an order we give an order as toys, and when we sell them we sell them as toys.
Q. Let me ask you about the different kinds of ware in china. There is a kind of ware that is known as Parian ware?
A. I believe there is, but I do not know anything about it.
Q. You are only an importer?
A. We deal in commoner goods, earthenware of that kind. I do not think it is used or sold among jobbers.
Q. You do know that there is a ware known as stoneware, do you not?
A. Yes, sir; as stoneware.
Q. Is there a ware known as crockery ware?
A. That is a general term. We call all these goods as crockery ware.
Q. This, for instance [showing sample to witness]?
A. Yes, sir.
76 Q. Anything that is put to a useful purpose, is it not?
A. Goods of all kinds, or goods of that kind. Whether they are for useful purposes or for toys, they are called crockery.
Q. It is the general name in your trade?
A. Yes, sir; the general name. Another name is queensware. You call them queensware and sometimes earthenware.
Q. They are all the one name, the same as crockery ware?
A. Yes, sir.
Q. How about granite ware?
A. That is the same thing. It is only a particular kind of ware.
Q. Sometimes called ironstone?
A. Yes, sir; it is called ironstone.
Q. That is the same as granite?
A. Yes, sir.

Q. Have you not a ware that is called toy ware?

A. No; nothing that the material out of which it is made is called toy material, or material to make toy ware of. I have never heard of that.

Q. So that the quality of these goods, their workmanship, does not give that a distinctive name in trade at all. Is that it?

A. I do not understand you.

77 Q. I presume that there is a certain kind of workmanship which gives the name of crockery ware and stoneware, is there not?

A. I do not know that the workmanship gives it.

Q. What is it that makes it?

A. It is the size, I should say.

By the COURT:

Q. What gives stoneware its distinctive character?

A. The material of which it is composed.

By the DISTRICT ATTORNEY:

Q. And the use to which it is put, does it not?

A. Yes, sir. All ironstone ware, I should say it did. It is used for table use. It is often called granite were, but toy ware is also made of white granite ware.

Q. These articles, so far as your knowledge goes, were imported as toys before 1883?

A. I should think so. I never heard any other name for them.

Adjourned until Friday, October 11, 1889, at 10:00 a. m.

78 ANDREW TOMPKINSON, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. Importer of earthenware and china merchant.

Q. What is the name of your house?

A. Andrew S. Tompkinson.

Q. Where is your place of business?

A. #532 Arch street.

Q. Is there or is there not in the trade a class of articles known commercially as toys?

A. There is.

Q. Were you in court yesterday?

79 A. No, sir.

Q. Look at those A B C plates and say whether or not they come within that class.

A. We import them as toys. They are known commercially as toys.

Q. How about that [showing sample to witness]?

A. The same thing.

Q. And this [another sample]?

A. The same thing with the cup and saucer.

Q. And with the mugs?

A. The same with the mugs.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long have you been in the business?

A. Thirty years.

Q. Prior to 1883 you were in the business?

A. Yes, sir.

Q. Did you import these goods then?

A. I did.

Q. Do you happen to know how they were entered into the different ports at that time?

(Objected to.)

The DISTRICT ATTORNEY. I wish to ask him whether he has
80 knowledge as to under what name these articles were entered by the importers prior to the year 1883. By what title or what description.

The COURT. If they did enter them under any title.

The DISTRICT ATTORNEY. Yes.

(Question withdrawn.)

By the DISTRICT ATTORNEY:

Q. Kindly say whether you know or remember under what name these articles were entered?

A. Always entered as toy cups and saucers and toy mugs.

By the COURT:

Q. In the custom-house?

A. In the custom-house.

By the DISTRICT ATTORNEY:

Q. Prior to the year 1883 did you have knowledge of many instances of different importations of these goods?

A. Yes, sir.

Q. Do you not know that prior to the year 1883 they were entered by importers here as earthenware, and not as toys?

A. They are always entered as earthenware and toys as well.

Q. I am asking you to confine your attention to prior to the year
81 1883. Do you not know that they were always entered as earthenware?

A. I do not understand your term. I do not know what you are driving at. All goods of that kind are entered as earthenware.

By the COURT:

Q. Without further designation?

A. Without further designation.

Q. Then what did you mean when you said they were entered as toys?

A. In an importation of earthenware of twenty crates there will be probably one crate of toy cups and saucers. It would not be designated as cups and saucers, but as earthenware.

By the DISTRICT ATTORNEY:

Q. The same articles prior to the year 1883 were not called as toys when they were entered, but entered as earthenware. That I understand you to say?

A. You misunderstood me. I say in an importation of twenty crates of earthenware there would be one crate of toy cups and saucers. It would not be entered as toy cups and saucers, but would be entered as earthenware. The duty is the same on the whole of the import.

Q. Was not, prior to that time—1883—the duty on toys higher than the duty on earthenware, if you remember?

82 A. I could not remember that.

Q. I understand you to say that this article is put to the same use (large) as this article (small), is it?

A. Yes, sir.

Q. That this is a toy (large)?

A. Yes, sir.

Q. And is used just as a child uses this (small)?

A. Yes, sir. Child of different age and different degree.

Q. These two or three articles are generally sold together, are they not (cup, saucer, and plate)?

A. Yes, sir.

Q. What are they called when they are sold?

A. Toys, cups, and plates.

Q. Are they not called a child's set?

A. No; they are not a child's set at all.

Q. Have you never heard them called a child's set?

A. No, sir.

Q. Never heard that name in your trade?

A. No, sir.

Q. Of course you do not mean to say that this article could not sometimes be used by a child as a useful article just as other articles of earthenware are used in household purposes?

83 A. No, sir; I could not say anything against that. That is perhaps. They are used as useful articles by a child, but only as a child would use them.

By the COURT:

Q. In any play, you mean?

A. For domestic common use of the child. Yes, sir. I have seen it done.

Q. And used in the same way that this article is (mug)?

A. Yes, sir; put on the table and used.

Q. And so with this or any of these articles (mug)?

A. Yes, sir.

Q. Even this one that is decorated in this way?

A. Yes, sir.

Q. Of course this is earthenware, is it not?

A. Yes, sir.

Q. So are all these earthenware?

A. Yes, sir.

Q. And these plates, too, are earthenware?

A. Yes, sir.

Q. How do you call this in trade (small)?

A. Toy tea set.

Q. And this (small)?

A. Toy tea sets.

84 Q. These articles that have been produced here, kindly say how they are brought to this country, packed?

A. I could not say. Those are German goods, and I never import German goods.

Q. How about these?

A. Those are packed in crates in large numbers.

Q. Just as other articles of earthenware that are used for household purposes are packed?

A. Yes, sir.

Q. How about these?

A. Those are all brought in crates and hogsheads and sorted afterwards.

Q. What is meant by Norfolk teas?

A. Norfolk tea is a smaller tea than is usually used in the Northern States. It is used in the Southern States entirely, and that is the reason it is called Norfolk. The first of these goods were made for Norfolk, Virginia, and they took the name of Norfolk from that fact.

Q. What is it that gives the name to the cup? The size or the name of the manufacturer?

A. No, sir; it is the size?

Q. Is it of this size?

A. No, sir; it is larger than that.

Q. Is it of this size (white)?

A. That is about the size of a Norfolk tea.

85 Q. When an invoice states a toy Norfolk tea, please tell me what that means.

A. I never heard of the term "toy Norfolk tea."

Q. So when the invoice uses the term toy it is used by a person who is not familiar with the term Norfolk as used in the trade?

A. I would suppose so. Norfolk is not a shape, it is a size.

Q. And it is a size in which toy ware does not come in your trade?

A. Yes, sir; that is correct.

By Mr. PRICHARD:

Q. You have said where there were twenty crates of earthenware brought into the country and one happened to be toy teas, they were all entered as earthenware. Would or would not the invoice of that particular crate of toy ware show it? Would not they so invoice them?

A. Certainly the invoice would show it, but the entry not.

Q. This is a Norfolk tea?

A. That is what I would call a Norfolk tea. A Norfolk tea is like all others, but differs in size.

86 GEORGE L. DYCH, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. With what house are you connected?

A. I represent my own business.

Q. What is your business.

A. China and glass and queens ware.

Q. How long have you been in business?
A. Thirty-five years.
Q. Is there or is there not a class of articles in that business known in the trade as toys?
A. Yes, sir.
Q. You have seen these samples that are here?
A. Yes, sir.
Q. Are they within that class?
A. I always bought them and sold them as toys.
Q. And that is their trade designation, is it not?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. You have imported these goods or have known them to be imported prior to the year 1883?
A. No, sir; never imported them.
Q. How long have you been importing them.
A. I am not importing them.
87 Q. You have only bought from importers?
A. Yes, sir.
Q. You have no knowledge then as to the name in which the importers entered these goods prior to the year 1883, have you?
A. Only by what they were billed to me. They were billed to me as toys.
Q. I have asked you whether you have had knowledge from your connection in your business as to the name under which the importers entered these goods prior to the year 1883?
A. No, sir.
Q. Will you give me the language which you use when you order these goods?
A. I say "Send me so many toy cups, saucers and plates, or toy cups and saucers," whatever I want.
Q. You never order them by their size, do you?
A. No, sir; I do not know them by size.
Q. You say that this article is used as a toy, is it?
A. Yes, sir. That is what I sell them for.
Q. I have not asked you what you sell them for. I have asked you the use.
A. I could not tell you that, except my own children use them
88 as toys. I do not know what other people use them for.
Q. Do not your children also use them for household purposes?
A. They do. I have never seen them use them at the table. Only at their own toy table playing by themselves.
Q. You have seen them used in other people's families.
A. Not that I recollect.
Q. Do you mean to say that the general use to which this article is put [large] is just like that one?
A. I do not think that is used as a toy. It is just to play with.
Q. This is to play with altoghther [small]?
A. Yes, sir.
Q. You mean to say just as this [small] is a plaything, this is [large]?

A. I could not say. I say that is used as a toy for a child to drink. And this [large] is used for a child to drink milk out of.

Q. At the table?

A. No; I said at the toy table. I have seen my children use them at a toy table.

Q. This is a toy, is it not [small]?

89 A. That is a toy set for small children to play with.

Q. In the same way you speak of this as toy [mug]?

A. Yes, sir.

Q. You would say the use to which this article is put is not a useful one [mug]?

A. I did not say that was useful. They can drink out of it.

Q. This is a plaything, and can only be used by children as an article of household use?

A. Yes, sir. The a, b, c on it——

Q. Having this on it makes it a useful article?

A. Having that makes it a toy I say.

JOHN E. FRYMIER, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. China crockery.

Q. Where is your store?

A. = 923 Market street.

Q. How long have you had experience in the business?

A. Twenty-odd years.

90 Q. Is there or is there not an article in that business known as toys?

A. Yes, sir.

Q. Are these articles so known?

A. They are so known in the trade.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long have they been so known as toys?

A. Ever since I have been in the trade.

Q. Do you mean to say that these cups and saucers have always been called toys?

A. Yes, sir; classified as such in the trade.

Q. Since when?

A. Always as such.

Q. Did you ever import any of this material?

A. Yes, sir.

Q. When was your last importation?

A. I could not say exactly. We are constantly getting those. We mostly import them through agents.

Q. Did you import any ware substantially like this prior to March 3d, 1883?

A. Every year we were receiving goods of that character through importers.

Q. State whether you imported goods substantially like these prior to 1883, either directly or indirectly.

91 A. We did; yes, sir.

Q. How were they entered by you or your agents when they were brought out of the custom-house?

A. They were received and accepted by us as toys. How they were entered I do not know.

Q. Do you not know?

A. No, sir.

Q. How were they described in your invoices?

A. As toys.

Q. Is it not a fact that ware like this in every particular was described as crockery ware prior to the passage of the tariff act of March 3d, 1883?

A. I have no knowledge of it.

Q. Do you make any distinction between toy teas and toys?

A. They come under that list, toy teas, toy mugs, toy muffins, &c.

Q. Do you make any distinction between toy teas and toys?

A. Certainly, there is quite a distinction.

Q. What is the distinction?

A. If you would come into our place and say you wanted toys we would ask you, possibly, whether you wanted toy tea, a toy muffin, whist-

92 ling bird, or something of that kind.

Q. If I came in and asked you for a toy, would you want to know what I wanted?

A. Yes, sir.

Q. If I came in and asked you for toy teas you would know certainly what I wanted?

A. Yes, sir.

Q. Would you get only those (small)?

A. No, sir.

Q. Would you not get a box of dishes like these, either larger or smaller?

A. No, sir.

Q. What is that?

A. That is a toy tea set. If you would ask for toy tea you would be shown that cup and saucer. If you would ask for a toy set you would get that (toy tea set).

Q. Toy relates to size?

A. Yes, sir.

Q. That is [indicates] a small size article of earthenware?

A. Yes, sir.

Q. It has nothing to do with the use?

A. No, sir.

Q. You are a toy dealer?

93 A. No, sir; general crockery dealer.

By Mr. PRICHARD:

Q. Is it size alone that determines the question as to whether the thing is known in the trade as toy?

A. No, sir. There is a certain line of goods in the trade that are known as toys, and known as such and bought and sold as such. Those goods you show here come under that head in the trade.

By the DISTRICT ATTORNEY:

Q. You have earthenware toys, do you?

A. Yes, sir.

Q. You deal in earthenware toys?

A. Yes, sir. They come under that head. Those would come under the head of earthenware toys.

Q. That is your business, is it not?

A. No; not particularly. General crockery and earthenware of all kinds.

Q. Whether the crockery or earthenware is a toy or not, you deal in them?

A. Yes, sir.

Q. Do you keep these goods?

A. Yes, sir; what sample?

Q. Do you keep those?

94 A. No, sir; I do not.

Q. How about these?

A. Similar to them.

Q. How about these (small)?

A. Similar.

B. F. CLEVENGER, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. Jobber in crockery and glassware.

Q. Where are you situated?

A. = 321 Market street.

Q. How long experience have you had in the business?

A. Twelve years.

Q. Is there or is there not a class of goods in the business known by the trade name of toys?

A. Yes, sir.

Q. Are these part of that class?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. Those are earthenware, are they not?

95 A. Yes, sir; they are toys. They are made of the same material that earthenware is made of, I presume, as far as I know, but they are toys. We so know them as toys.

Q. Why do you say they are toys?

A. That is the only name they have ever been known by to my knowledge.

Q. They have never been known as earthenware?

A. The material is the same material as earthenware.

Q. Have these not been known in your trade as earthenware goods and so entered in this port?

A. I never had them entered that way.

Q. Did you import these goods prior to the year 1883?

A. Yes, sir; through New York importers. Not direct.

Q. Do you know under what name they were imported prior to the year 1883?

A. Under the title of toy teas.

Q. Do you know how they were entered and imported? Not what others told you.

A. I can only tell you how they came to me. Of course I can't speak of what other men may do. I speak of how we received the goods.

Q. From the importer?

96 A. Yes, sir.

Q. What do you call these (small)?

A. Those are toy tea sets.

Q. The same use to which a child puts this cup and saucer (small), you mean to say he puts this one, too (large)?

A. Yes, sir; that is a toy.

Q. These, of course, could be used for practical use, just as other china is used by a child, could they not?

(Objected to.)

A. It could be.

The COURT. Besides its being self-evident, every witness called by the plaintiff says they are susceptible and are used. It is not a matter open to the slightest controversy. It is not necessary to ask every witness the question. It is not open to controversy. The witness has said simply what every witness called by the plaintiff has said: these cups may be used for that purpose and are used to drink out of at the table. That question is out of this case. The plaintiff has proved it himself.

97 JOSEPH G. A. FISHER, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. Crockery and glassware.

Q. Where?

A. # 519 Market street.

Q. How much experience have you had in the trade?

A. Seventeen or eighteen years.

Q. Is there or is there not a class of goods in the trade which are known by the trade name of toys?

A. Yes, sir.

Q. Are these goods within them?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. Do you import or do you buy?

A. Not directly. We import them through the manufacturer's agents on this side. We give them import orders, but we do not enter the goods.

Q. Prior to the year 1883 did you have any knowledge of the importing trade of these goods; have you knowledge of it?

A. I do not exactly understand that question.

98 Q. Do you know under what name, prior to the year 1883, these goods were imported and brought into this port by these people or importers?

A. Do you mean how they were entered at the custom-house?
Q. Yes.
A. No, sir.
Q. Your line of business is what?
A. Jobbers of crockery and glassware.
Q. Of all kinds?
A. Yes, sir.
Q. Of earthenware toys?
A. Yes, sir.
Q. You keep a full line of toys?
A. We do not keep a very full line. We keep general assortments that are kept by jobbing houses.
Q. Do you keep those? [Handing samples to witness.]
A. Yes, sir. Similar to that. Not exactly the same thing. I mean we have the same size cups and saucers and same shapes, but of different decoration.
Q. You call that a toy department?
A. Yes, sir.
Q. If a person went into your place and asked to see earthenware toys you would bring out these?
99 A. If they would say they wanted a toy-plate set we would show them that.
Q. If a man went into your shop and asked you to show him your line of earthenware toys, you would show him these?
A. Yes, sir.
Q. Do you keep these (small)?
A. Yes, sir.
Q. These are toys (small)?
A. Yes, sir.
Q. That is their name?
A. Yes, sir.

H. BAUMAISTER, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?
A. Importer of toys.
Q. Where is your place of business?
A. = 207 Church street, Philadelphia.
Q. How long experience have you had in that business?
A. Seventeen years.
100 Q. Has there been during all that time a class of articles made of earthenware and known commercially as toys?
A. Yes, sir.
Q. You have seen these articles here?
A. Yes, sir.
Q. Are these articles toys?
A. Yes, sir.
Q. Is that their trade designation?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. Your knowledge of the business goes back further than 1883, does it not?

A. Yes, sir.

Q. Do you happen to remember under what name these goods were brought into this port prior to the year 1883?

A. I have only known part of the invoices. Those that we imported ourselves. The china tea sets—the box—we always imported as toys (small). Those which we gave orders for (large).

Q. What do you mean by that?

A. I mean those cups, saucers, and plates. We gave import orders for toy tea sets, toy cups, saucers, and plates.

Q. To whom would you give the order?

101 A. To the party who imported them for us.

Q. Under what name did that party bring them in here?

A. Toy tea sets, and toy cups and saucers, and plates.

Q. These are earthenware, are they not?

A. I do not know anything about what they are.

Q. You keep a line of earthenware goods?

A. No, sir. We keep a line of toy goods.

Q. Do you keep these (small) in your stock?

A. Yes, sir. We import those.

Q. These are called what?

A. They are toys.

DANIEL YOUNG, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. Crockery and glassware, # 215 and 217, North Third street.

Q. How long experience have you had in the business?

A. Well on to thirty years.

Q. Is there or is there not in that business a class of articles which are known in the trade as toys?

A. Yes, sir.

102 Q. You have seen these articles here?

A. Yes, sir.

Q. Do they come within that class?

A. Yes, sir.

Q. Have they always been so known?

A. Always to my knowledge.

Cross-examination by the DISTRICT ATTORNEY:

Q. You were in this business prior to the year 1883?

A. Yes, sir.

Q. You had knowledge of how these goods were brought into this port prior to the year 1883?

A. Yes, sir.

Q. I mean under what name?

A. Yes, sir.

Q. How did you get that knowledge?

A. From connection with the business. We ordered them and had them come in by the regular way.

Q. You did not bring them in yourself—actually enter them yourself?

A. No, sir. They came in on our orders.

Q. Therefore you only know the names that were used just because of the invoices that you received?

103 A. We ordered them as a certain thing and got what we ordered.

By the COURT:

Q. What did you order?

A. Ordered them as toy teas, toy plates and toy mugs always.

By the DISTRICT ATTORNEY:

Q. From the importer?

A. From the manufacturers' agent.

Q. And that manufacturer's agent was in this country?

A. He was in this country and billed them to us in that way. That is the way we order them.

Q. You do not know under what name that manufacturer's agent entered them in this country, do you?

A. I do not.

EDWARD C. RICHMOND, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?

A. Toy business.

Q. Connected with that firm?

A. Conway Brothers.

Q. Where is your place of business?

104 A. #229 Church street, Philadelphia.

Q. How long experience have you had in the toy business?

A. Eleven years.

Q. Is there or is there not a class of goods made of earthen ware and known in the trade as toys?

A. Yes, sir.

Q. Are these goods within that class?

A. Yes, sir.

Q. That is their trade designation?

A. Yes, sir. That is the only thing we keep, toys.

Q. You buy and sell these goods as part of your business under that trade name?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. Do you sell these cups separate as toys?

A. Yes, sir.

Q. You also sell them this way, do you not (cup, saucer, & plate)?

A. Yes, sir; both ways.

Q. When you sell them this way what do you call them?

A. Toy cup, saucer, and plate.

Q. Do you call it a child's set?

A. No, sir; we do not keep anything but toys in our business.
105 Q. You never heard the term in your business as a child's set?
A. Yes, sir; probably I have.
Q. You have heard the term?
A. Not as a general term.
Q. Have you or have you not heard it?
A. I have heard it in the same connection as child's tea set bought for a child.
Q. It is bought for a child?
A. I presume so.
Q. Let me have what is your actual knowledge.

By the COURT:

Q. What have you heard it called by purchasers?
A. Toys.
Q. Any other way?
A. No, sir.
Q. Never as a child's set?
A. No, sir: the name is not familiar to me.
Q. We do not want to know what it may have been, but what you have heard.
A. I may have heard it, but never as a general rule.
Q. But you have heard it?
A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. When you heard it what did you think it meant?
A. I thought it meant just what it is.
106 Q. What is it?
A. It is cup, saucer, and plate.
Q. Of this size?
A. Yes, sir.
Q. And when you heard the term "child's set" your mind fixed at once on these?
A. Yes, sir.

By the COURT:

Q. In the trade, and by those who deal in the article, merchants, what have you heard it called?
A. Toys.
Q. Did you ever hear it called anything else?
A. I have heard it called, as this gentleman just said, occasionally a person will ask——
Q. I am speaking now of men who deal in them.
A. Toy cup, saucer, and plate.
Q. You have heard them called "a child's set" by persons who came to buy a single plate, cup, and saucer?
A. Yes, sir.
Q. But not by the merchant?
A. No, sir.

By the DISTRICT ATTORNEY:

Q. Have you imported these articles into New York?
A. No, sir.
Q. Have you imported them here?
A. No, sir.

107 E. C. GREY, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?
A. I am employed by Conway Brothers.
Q. How long experience have you had in this trade?
A. About eight or nine years.
Q. Is there or is there not a class of goods made of earthenware and known commercially as toys?
A. Yes, sir.
Q. Are these in that class?
A. They are.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long have you known the business?
A. Some eight or nine years.
Q. That would be prior to the year 1883?
A. Yes, sir.
Q. If you have any knowledge, state under what name these goods were entered in these ports prior to the year 1883.
A. I have no knowledge on that subject
Q. Did you ever hear the term in your trade of "a child's set?"
108 A. I have not. Except as applying to a child's tea set. I have heard it. Not in relation to that cup, saucer, and plate; I have not.
Q. I have asked you whether you have ever heard in your trade the term a child's set?
A. I said I had. I think you will find that stencilled on some of those boxes.
Q. You have heard it?
A. Yes, sir; I have heard it in relation to these goods there (small).
Q. These are a child's set?
A. Yes, sir; a child's tea set.
Q. These are toys (small)?
A. They are strictly toys.
Q. Those are known as toy tea sets (small)?
A. Yes, sir.
Q. Have you ever heard the term a child's set?
A. I have not.
Q. This is of course earthenware?
A. Yes, sir.

MERMAN MENCKE, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?
109 A. China glassware.

Q. Where is your place of business?
A. # 902–4 Arch street.
Q. How long experience have you had in that business?
A. I have had about twenty-two years' experience in the business, but I have been for myself about seven years.
Q. Is there and has there been during all that time a class of articles known commercially in that business as toys?
A. Yes, sir.
Q. Do these articles here come within that class?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. Do you keep a toy store or china store?
A. China and glassware.
Q. Do you advertise to sell toys?
A. No, sir; but we handle them.
Q. When you buy these, from whom do you buy them?
A. Those we buy from.
Q. What is their business?
A. They are dealers in fancy goods.
Q. What kind of fancy goods?
A. China ware.
110 Q. They are dealers in china ware exclusively, are they not?
A. No, sir.
Q. What other kind of fancy goods?
A. They handle glassware.
Q. But nothing but glassware. They do not keep toys like across the street there?
A. They keep toy tea sets.
Q. You mean these (small)?
A. Yes, sir. I notice they have some china dogs there also.
Q. You do not import these yourself, do you?
A. Yes, sir; I have been importing these goods the last two years.
Q. Never prior to the year 1883?
A. No, sir.
Q. Do you ever buy yourself from manufacturers in this country?
A. No, sir.
Q. They are made in this country, are they not?
A. Not that I know of; no, sir.
Q. You are not very familiar with it, are you?
A. I am with the trade; yes, sir.
Q. Do you mean to say that articles like these have not been and are not made in this country?
111 A. I could not say they are not made in this country.
Q. When did you see them last?
A. I have no knowledge of seeing them here at all.

Mr. PRICHARD. Are you asking him as regarding the general line of earthenware toys or only those particular articles?

The DISTRICT ATTORNEY. I am speaking of those samples you have now on the table.

J. MEYER, having been duly sworn, was examined as follows:

By Mr. PRICHARD:

Q. What is your business?
A. Importer of toys and china ware.
Q. Where is your place of business?
A. #810 Strawberry street.
Q. How long experience have you had in the business?
A. From 1883 down.
Q. Have you any knowledge of the business abroad as well as here?
A. Yes, sir.
Q. Is there or is there not in the business a class of articles which are known in trade by the name of toys?

112 A. Yes, sir.

Q. Are these articles part of that class?

A. These articles are part of that class, and when we go over there we buy them as toy tea sets or toy cups, saucers, and plates. They are offered to us by the manufacturer as such.

Cross-examination by the DISTRICT ATTORNEY:

Q. Do I understand you do not make any distinction between toy tea sets such as this (small sample) and these articles of crockery ware?
A. No.
Q. You make none?
A. No, sir.
Q. They are understood by the trade, at least since 1883, to be the same article, are they?
A. They are toy tea sets.
Q. This is a toy tea set (large sample), that is toy tea sets?
A. Those are cups, saucers, and plates.
Q. These (small sample) are distinctly known as toy tea sets?
A. Not at all. Understood under the same name, not distinctively from the others.

113 Q. Is not that so described on the lid?

A. Yes, sir; they are toy tea sets.

Q. Did you not say they were not when I asked you a moment ago?
A. No; I say they were not understood to be toy tea sets distinctively from the others.
Q. You say that in the trade since 1883 these are known as toy tea sets (large sample), and these are known as toy tea sets?
A. Yes, sir; that is correct.
Q. As matter of fact, is not this known as a toy plate, cup, and saucer?
A. You can call it either way if you put some together.
Q. What are they called?
A. If you take these alone—we never sell them single—but if you sell a dozen of them they are toy tea sets. Now it is cup, saucer, and plate.
Q. If you sell cup, saucer, and plate, what is it known by?
A. We never sell single; we sell a set.
Q. What is a set?

A. Dozen cups, a dozen plates, and a dozen saucers is a set.

114 Q. When they are sold in a set they are known as toy tea sets?

A. Yes, sir.

Q. I want to know what the trade knows them as?
A. The trade knows them as toy cups, saucers, and plates.
Q. When they are sold in sets of a dozen each?
A. We always sell them by the dozen, then we simply refer to them as toy tea sets.
Q. When you sell them singly?
A. We never sell them singly.
Q. So far as your knowledge is concerned, it goes to this extent only, that when you deal in them in dozens they are known as toy tea sets, dozen cups, dozen saucers, and a dozen plates. To whom do you sell?
A. We only sell to the retailers. We are wholesalers.
Q. You did not import prior to 1883?
A. No, sir.
A. Is not this sometimes called printed ware?
A. I never heard it called that way.
Q. What is this called? [Heading sample to witness.]
A. Toy mug.
Q. And that?
A. Toy mug.
Q. Why is it called toy mug?
115 A. Because it is used by children as a toy.
Q. Do you say that of your own knowledge? Why is it called a toy mug?
A. I have no knowledge outside of our own business what children do with them.
Q. Is not this sometimes called a Norfolk tea?
A. I never heard the term.
Q. You never heard it called that?
A. No, sir.
Samples and catalogues offered in evidence.
Plaintiff rests.

Testimony on behalf of the Government.

JAMES K. KERR, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. What is your business?
A. I am in the china, glass, and earthen ware business, with R. J. Allen & Son.
Q. How long have you been in the business?
A. All my life. About thirty years, except the three or four years I was in the appraisers' department of the custom-house.
116 Q. You have noticed these samples that have been introduced here?
A. Yes, sir.
Q. They are known in your trade?
A. Yes, sir.
Q. Please state under what name they are bought and sold and used.
A. These are toy cans, muffins, five and six inch muffins, and others known as Norfolk teas.
Q. What is this?

A. Toy can.
Q. What is that?
A. That is a Norfolk tea.
Q. What is this?
A. That is a five-inch plate.
Q. Have you or not ever heard these articles as being bought and sold and used in trade as toys?
A. Not that I am aware of; no, sir.

By the COURT:

Q. Never as toy plates and toy muffins?
A. No, sir.

By the DISTRICT ATTORNEY:

Q. In what years were you in the Government employ?
A. I think I went there in the forepart of 1883 or 1882, I forget which, something along there.

117 Q. At that time did you have knowledge of the importation of these articles into this country?
A. Yes, sir; I passed all of them.
Q. You were the examiner?
A. Yes, sir; examiner of china, glass, and earthen ware.
Q. Prior to March 3d, 1883, was it?
A. Yes, sir.
Q. Please state under what name, under what designation these articles were at that time entered into this country.
A. Those were entered as toy cans, those as muffins, those others as five and six inch muffins, and A B C.
Q. Under what clause of the tariff act?
A. Under earthenware, forty-five per cent.

By the COURT:

Q. He did enter them as Norfolk teas?
A. Yes, sir; and as printed muffins and these toy cans.

By the DISTRICT ATTORNEY:

Q. You were formerly of the firm of James K. Kerr and Company, were you not?
A. Yes, sir. I have charge of the retail department of Allen & Sons, buying their glass.

118 Q. You have been in Europe this summer?
A. Yes, sir.
Q. There in connection with business?
A. Yes, sir.
Q. Did you see cups similar to these?
A. Yes, sir; the same size as those. I have bought them—the cups and saucers.
Q. These plates?
A. No; not plates.
Q. Please state by what name they are known there.
A. I bought them as cups and saucers.
Q. Did you or not buy them as toys?
By the COURT. Any other designation?
A. No, sir; small cups and saucers.

By the DISTRICT ATTORNEY:

Q. No other designation that you know of?

A Not that I know of. They do not make toys where I bought them.

Q. What kind of manufacture was it?

A. Earthenware. Manufacture all kinds of earthenware, dinner sets, plates, manufacturers of imperial stone; almost everything you can think of except toys.

Q. You go over every year, do you not?

A. I have for the last two years; yes, sir.

119 Cross-examination by Mr. PRICHARD:

Q. You are connected with the same house that Mr. Snow is connected with, who was examined here for the plaintiff?

A. Yes, sir; he has the wholesale department and I have the retail.

Q. There have been certainly for ten or fifteen years a class of articles made of earthenware and known under the name of toys?

A. Yes, sir.

Q. I call your attention to the standard price list for 1882, January, of Dale & Davis, Prospect Hill pottery, of Trenton, New Jersey. You find there toy plates, toy teapots, toy sugars, toy creams, toy bowls, toy teas unhandled, toy teas handled, and toy tea sets, do you not?

A. Yes, sir.

Q. Those were proper trade terms at the time, were they not?

A. I do not know what kind of goods they are.

Q. I want to know from you if there was at that time a class of goods known as toy ware?

A. There were toy tea sets made before that, long ago.

120 Q. Not only toy tea sets, but toy teas and toy plates?

A. Yes, sir.

Q. And toy cans?

A. Yes, sir; they may have been made as long, but I can't recollect.

Q. You have said this thing was known as a five-inch a, b, c muffin?

A. Five-inch muffin, a, b, c.

Q. I show you the price list of Brown Hill Pottery Company, of England, for 1883, and call your attention to toy muffins four, five, six, and seven inch; what were those?

A. I do not know what they were; I only know what I saw.

Q. Would not these goods come within that class?

A. I never had anything like that pass during the time I was in the custom-house in that way up to 1883; that was the time the tariff was changed.

Q. In point of fact there was a class of earthen-ware goods entered as toys before 1883?

A. Yes, sir.

Q. And it was a question of some difficulty with the custom-house, and before that time the Treasury Department had attempted to draw

121 a line, had it not, between toys and earthenware; you did have instructions under which you entered?

A. Not that I recollect, except some outside thing; not with regard these things.

Q. What I am asking is whether prior to 1883 the Department had not given instructions by which the appraisers guided themselves in determining what were toys and what were earthenware?

A. Not that I am aware of.

Q. You say it is not so?

A. I say not that I am aware of. It might be in the toy department or something of that kind, with which I had nothing to do. I was miscellaneous; sometimes I had toys, but generally earthenware, china, and glass; that was the main portion of my business.

Q. You were left to your individual judgment as to which were toys and which were earthenware?

A. To a certain extent; yes, sir.

Q. What is the difference between the toy ware of commerce and ordinary earthenware?

A. I do not know; I suppose the term "ware" is the same as you say dinner ware or chamber ware.

Q. You have said that prior to 1883 there was a well-known
122 class of goods known as toys, and I have shown you the catalogues. What distinguished them?

A. I never noticed that toy ware before. I do not think I ever noticed toy ware before.

Q. I call your attention to that catalogue, and I ask you whether there was not a class of ware known as toy ware, and you answered yes, prior to 1883.

A. Yes, sir; there is toy ware there.

Q. What are the distinguishing characteristics which distinguished the toy ware or did before 1883—in 1883, say—distinguished the toy ware from the common earthenware?

A. There were earthenware toy tea sets. They were quite small. The cups were not quite as large as that. The teapots were small and the sugar and creams were small.

Q. About as large as that? (Set in box.)

A. That is a pretty good-sized one. About like that.

Q. About as large as that? (Sample shown witness.)

A. If that came in the custom-house we would classify it as sixty per cent.

By the COURT:

Q. The question is whether or not in 1882, as you understood
123 the trade term, those would have fallen within it?

A. Yes, sir; I presume they would, a cup like that.

Q. Is it not true that the distinguishing characteristic of all this ware is that it bears upon its face, either from its size or from the character of its decoration, that whatever it may be used for its distinguishing characteristic is that it amuses children?

A. I should say that would amuse a child with the pictures or the a, b, c.

Q. So that, although it is apparent to all of us that that could be used, and often is as a plate on the table for a child, the thing which distinguishes it from the ordinary plate which is used on the table is that it is calculated while the child's mother is engaged in her own eating to amuse the child by the pictures or letters?

A. That is an ordinary size plate to use on the table.

Q. And without those figures and that decoration would serve for ordinary use?

A. That is an ordinary size plate used on a table.

Q. The same is true, is it not, of the toy cans? So that while it may be used on the table for a child it also serves the purpose, and that is the object of the decoration, of course, to amuse the child while it
124 is at the table?

A. It might amuse the child; yes, sir.

Q. As I understand you, you do not feel that you can draw the line between what in 1882 was toy ware, what was a toy muffin, for instance, and what was ordinary ware?

A. They never were claimed as toys at that time.

Q. I assume, perhaps, that the importers accepted the line drawn by the Government officers. The question is whether these things which in 1882 were known in the trade as toy muffins and toy plates were not those that had those distinguishing characteristics?

A. In 1882?

Q. Yes.

A. There were not known as toy plates then. They were never invoiced as toy plates.

The COURT. He means known to trade, not to the customs officers.

The WITNESS. I do not know as they were known to the trade at that time.

By Mr. PRICHARD:

Q. I show you trade list of American manufacturers, dated Jan-
125 uary, 1882, which has on it the term toy plates. I ask you what, if you do know—if you do not know, of course I wont ask you—what those toy plates were.

A. That I do not know.

By the COURT:

Q. What would come within that designation? Would these plates come within that designation?

A. I should think, from my own judgment, that a smaller size plate from that would be a toy plate, together with a toy tea set.

Q. You would think these ornamented plates would not fall within that designation?

A. It depends a great deal on the person who would buy them, and the person, and all that kind of thing.

Q. The question would be, of course, what does the designation cover in the trade?—not the child's designation, but the trade designation.

A. The trade might take that for a toy.

Q. The trade might take that as in that designation?

A. Yes, sir; the smaller one.

Q. You cannot say certainly about it?

A. No, sir.

By Mr. PRICHARD:

Q. You say you bought some goods abroad this summer?
126 A. Yes, sir.

Q. Where did you buy them?

A. I bought them in Germany.
Q. What kind of goods were they?
A. German goods.
Q. Were they goods for the ordinary use of table ware?
A. Very similar to that; about the same size, only different decoration.
Q. In dinner sets, were they?
A. No; just all the cups and saucers by themselves.
Q. Were they coffee cups or tea cups?
A. They were the same size as that tea cup. We sell them for tea cups.
Q. Do you not know the ordinary tea cup in commerce is larger than that?
A. We sell them for tea cups. The ordinary tea cup is larger, but there are a great many cups sold of that size. A great many cups of that size sold; very fine cups and very ordinary ones.
Q. What is the name of the firm?
A. Francz Antemehler.
Q. What was the technical name on the invoice of those goods?
127 A. No; I could not tell you. That was made out in German, and I can't read German.
Q. You do not know what the invoice was?
A. No; I just know the cups were there.

By the COURT:

Q. Have you a toy department in your trade?
A. No; I think they are merely invoiced as , which is cup in German. It is my impression that is a cup in English.
Q. Those articles are not sold in the store of Allen & Company for toys?
A. No, sir; I bought those for special purposes for the retail department.
Q. What special purpose?
A. For church fairs.
Q. This was an importation which you bought for a special purpose in Germany?
A. Yes, sir.
Q. Which you sell for that purpose, of course?
A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. Do you sell these (mugs)?
A. No, sir; not in the retail department. I think they do in the wholesale.
Q. You have no doubt, have you?
128 A. No, sir.
Q. I mean these other samples.
A. We have most of these things in the wholesale department.
Q. You sell these cups and saucers to a considerable extent, do you?
A. Yes, sir.
Q. Large quantities of them?
A. I do not know what they do in the wholesale department. I know we sell a great many of them.

By Mr. PRICHARD:

Q. You have never been in the wholesale business, have you?
A. No, sir.

WILLIAM S. HANCOCK, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. What is your business?
Q. Manufacturer of earthenware.
Q. Where are you situated?
A. At Trenton, New Jersey.
Q. What is the name of your place?
A. The Crescent Pottery Company.
129 Q. How long have you been in the business?
A. About eight years.
Q. Do you know in the earthenware trade such articles as these?
A. I do.
Q. Under what names are they bought, sold and used?
A. Cups, saucers and plates.
Q. How about these (mugs)?
A. Mugs.
Q. How about these?
A. Also mugs.
Q. And these?
A. Alphabet plates.
Q. To what use are those put, if you know?
A. General table use.
Q. Have you any knowledge as to the name under which these articles were brought into this country prior to 1883?
A. I have not.
Q. You have been to the establishment of Mr. Fisher, in Philadelphia, have you not? The gentleman who was called here as a witness.
A. Yes, sir; I called there yesterday.
Mr. PRICHARD. If it is to contradict the witness Mr. Fisher's attention should have been called to it.

130 By the DISTRICT ATTORNEY:

Q. Did you or did you not inquire to be shown earthenware goods for children's use in Mr. Fisher's store?
(Objected to.)
The COURT. I do not think it is evidence. Of course toys are for children's use. Small cups are for children's use, but that does not bear on the question of what is the commercial designation of these things.
The DISTRICT ATTORNEY. Would it not be competent to show that these same articles that are spoken of here by the plaintiff as toys, that when the request is made in the shop of those people for children's toys and these things are shown as children's toys (small) and these are not?
The COURT. I understand the purpose of this to be to show that these things were exhibited as articles for children's use. That would not contradict the plaintiff's case at all.

The DISTRICT ATTORNEY. I think each of the witnesses were asked, certainly those whom I examined, whether they made any distinction between these toy tea cups here and the cups, saucers, and mugs and they said they did not.

131 (Objection sustained. Exception for the Government.)

By the DISTRICT ATTORNEY:

Q. Do you know whether or not these articles, or similar to these, are made in this country? [Handing witness cup and saucer.]

A. We make the same shaped goods, but the decorations may vary from that, not the exact pattern but the figures. The size and shapes are made in this country.

By the COURT:

Q. And the same character of ware?

A. Yes, sir; regular earthenware.

(No cross examination.)

At one o'clock the court took a recess until two o'clock.

132 2 P. M.

F. B. BILING, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. Where do you live?

A. In Bayonne, New Jersey.

Q. What is your occupation?

A. I am a United States examiner in the port of New York.

Q. What is your business?

A. I have examined china, glass, and earthen ware for appraisement?

Q. What was your business before you entered the Government's employ?

A. China and glass ware has been my business.

Q. For how long have you been in this business as examiner?

A. For four years.

Q. Prior to that how long had you been in the business of china and glass ware?

A. Since I am fourteen years old, and that is twenty-one or twenty-two years ago. I am thirty-five years of age now.

Q. You learned your business where; in this country or abroad?

A. Abroad.

Q. You have examined these articles of earthenware. Please state, if you know, under what name they are bought and sold in the trade.

133 A. As an earthenware cup and plate.

Q. Please state, if you know, what is the chief use to which these are put.

A. Table use for children. Also for grown people and tea parties.

Q. How about this [showing mug to witness]?

A. As a child's mug.

Q. And that?

A. That also.

Q. Also this one?

A. Yes, sir.

Q. And this one with "Having a Rest" on it?

A. Yes, sir. That does not affect it.

Q. What are these plates known as?

A. Those are known as A B C plates.

Q. Please state whether or not in the trade they are bought, sold, and used under the name of toys?

A. They are not.

Q. When did you come to this country?

A. In 1871.

Q. If you know, state whether these goods, or goods similar to these, were imported into this country prior to 1883.

134 A. Yes, sir.

Q. State, if you know, under what name and designation they were imported?

A. Printed earthenware, printed cups, printed mugs, printed A B C plates, glassware, mugs, and so on.

Q. Under what name are they now imported, and have been since 1883?

A. Under the same name.

Q. In New York, that is?

A. New York; yes, sir.

Q. What is this [small set in box]?

A. Toy tea set.

Q. Certain price lists have been offered here, one of them known as the Brownhill Pottery Company. There is, on page 22 of that, the words "Toy teas." Please state, if you know, what is the technical meaning of the word "toy" in the china and glass business.

A. The meaning of the word "toy" in the china business denotes something very small of its kind, of little or no practical use, simply for the amusement of children—something that is very small, insignificant, and of no use for practical use, excepting to amuse children.

Q. For the amusement of children?

A. Exclusively.

135 Q. If you can remember, just mention, in order that we may have an illustration or example of what you mean?

A. In the port of New York things are imported small in kind and designated on the invoices as toys. For instance, a toy shoe, a match box in the shape of a shoe, which is very small. Also holy-water fonts which are used by the Catholics, which come very small, are called toy fonts.

Q. For children's use?

A. For household use, not often for children's use, but simply being very small and inexpensive, costing but a cent or two. They call that a toy font.

Q. Give any other illustration of the use of the word "toy" in china?

A. All about the same, excepting a toy tea set of that description [small set in box]. It is designated a very small toy tea set, which can be used for nothing but children to play with.

Q. What was the name of the house you were with before you became an examiner?

A. Hermann Drost & Co.

Q. How did they compare in point of magnitude in their business with other houses in the same trade?

A. They did at that time the largest business in the country. They are dissolved now.

136 Cross-examination by Mr. PRICHARD:

Q. Was that a wholesale house?

A. Yes, sir.

Q. What was your position?

A. I entered there as office boy and worked my way up as confidential clerk, holding the positions as bookkeeper, salesman, custom-house clerk.

Q. As I understand you there was a class of earthenware articles which are known as toys?

A. Yes, sir.

Q. And always have been?

A. Yes, sir.

Q. So that when you use the word "toy ware" in connection with earthenware, what do you mean? Do you mean that class of articles?

A. I mean those toy tea sets [small set in box].

Q. How about the large tea sets? They have only come in the last four years.

A. Formerly they were only imported very small.

Q. What would you say as to that [referring to set in box]? There is an American set.

A. That is now called a toy tea set.

137 Q. That is American?

A. I don't know that it is American. I know nothing about American goods.

Q. Do you not know American earthenware when you see it?

A. No.

Q. If you are familiar with imported articles, you ought to know whether these are imported or not?

A. They might be imported.

Q. There are things similar to these imported?

A. There might be. It might be English.

Q. Can you not tell by looking at it whether it is English or not?

A. That might be English.

Q. What would you say as to a thing of this kind [large set in box]; is that a toy tea set?

A. As it is put up here it is a toy tea set, but it can be used for a dinner table.

The COURT. The question is, what is it called in the trade?

A. As it is put up there, a toy tea set.

By Mr. PRICHARD:

Q. I understood you to say there were a number of articles which had a trade designation as toys, although really they were not used for
138 the amusement of children at all, as, for instance, the household font? Is that so?

A. Yes, sir.

Q. So that in that trade it has a trade designation, and not one merely relating to use?

A. No, it is not a trade designation. It is something to denote the article is very small. It is not used by all manufacturers; only by some.

By the COURT:

Q. The question is whether these things are known in the trade as toys, the small fonts?

A. They are not known in the trade as toys?

By Mr. PRICHARD:

Q. You pass them as toys, do you not?

A. No, sir.

Q. Did you not say so a few minutes ago?

A. I think not.

Q. Did you not say they were called toys?

A. I did not say I passed them.

Q. Did you not say they were called toys?

A. In the invoice.

Q. You were asked what they were known as and by what name, and you said toys?

The DISTRICT ATTORNEY. I asked what was the meaning of the word "toy" in the trade, and as an illustration of the use of that word "toy" this one thing was given.

139 By the COURT:

Q. You now say they are known as toys?

A. They are simply so called in the invoice.

Q. They are called nowhere else but in the invoice?

A. As far as I know.

Q. They are not called toys by merchants?

A. No, sir.

By Mr. PRICHARD:

Q. You do not recognize that as a correct term applied to those fonts?

A. No, sir.

Q. Why do you mention it as an illustration when you were asked to say what the meaning of the word "toy" was in these catalogues?

Q. To show that it was misapplied; to show that the word "toy" in an invoice does not always mean a toy.

Q. You mean that is misapplied in the trade?

A. Yes, sir.

Q. So that in your judgment when they use the word "toy" in the trade it is a misapplication?

A. In this particular instance.

By the COURT:

Q. I understood you to say, in the trade these little china articles, such as fonts, etc., are not called toys?

140 A. In the trade they are not called toys.

Q. And you gave us this as an instance?

A. In the invoice.

By Mr. PRICHARD:

Q. To be entirely fair with you, do I understand, or do I not understand you to say that the word "toy," when used in the china trade, signifies usually something small?

A. Small; of no practical use.

Q. Do you know what the size of the smallest tea plate is that is in practical use?

A. Six inches.

Q. Do you know what a toy muffin is?

A. A toy muffin is a small six-inch plate, seven-inch plate, or a five-inch plate.

Q. Could not a seven-inch plate be put to some practical use?

A. Yes, sir.

Q. You have just said when it is used in the china trade it meant something small, that could not be applied to practical use. If a toy muffin can be seven inches, why cannot it be applied to practical use?

A. In this particular instance you speak of——

Q. I am asking as a general thing. You have said to this jury
141 that toy, in the china trade, means something that is very small and has no practical use. You have said toy muffins are plates five to seven inches in size. I ask you why these plates, which it is quite evident can be applied to some practical use, why they are called toy muffins?

A. I don't know why.

Q. So that the distinction which you first gave will not fit all cases?

A. That is what I said.

Q. How do you distinguish a toy muffin from a toy plate six inches wide?

A. The only term for them that I know of is A, B, C. The only thing I know in a toy muffin.

Q. That meant, you say, that it would be a toy muffin?

A. They are called in the trade a toy muffin.

Q. How would you know a muffin toy from any other toy plate?

A. The only thing I know as a toy muffin is this A B C.

Q. A toy muffin includes, in your judgment, one of those things that have A B C on them?

A. As a known plate.

Q. It is only those things which have the alphabet around them which are known as toy muffins?

A. To me.

Q. I am asking in the trade.

A. As far as I know.

142 Q. How far do you know?

A. I have given you my experience.

Q. Are you able to say from your experience in the trade whether those toy muffins in the catalogue include only A B C plates?

A. I could not.

Q. Is it not true in the catalogue when they only intend to refer to A B C plates they call them A B C plates?

A. No, sir; they invoice them.

Q. Let us get away from the New York custo n-house.

A. I am not speaking about the entry. I am speaking about the invoice.

Q. I am asking you whether in trade catalogues, where they wish to include only A B C plates, they do not use the term A B C plates?

A. Some houses, I believe, always call them A B C plates.

Q. It is a perfectly well-known term in the trade?
A. Yes, sir.
Q. So, also, is toy can, is it not?
A. It is not so well known.
Q. It is a well-known term in the trade, is it not?
A. It is a well-known term in the English trade. Not in other trades.
Q. What does it include?
143 A. A very small mug.
Q. Can you give the size?
A. Smaller than those, there.
Q. Are you quite certain about that?
A. So far as I know.
Q. How far do you know? Only from invoices?
A. I have given my experience.
Q. What I ask you to say is whether you have had such experience in the trade as to be able to say to this court and jury that you are positive from your experience in the trade that the words "toy can" only includ' mugs under a certain size?
A. As far as I know a toy mug——
Q. What I ask you is to say either that you are able, or that you are not able, to say to this jury what is the limit of size of a toy can in the trade to-day?

By the COURT:

Q. Have you a knowledge that enables you to say?
A. I must qualify that answer, because I can only say as far as I know.
Q. Have you a knowledge that enables you to say?
A. I believe I have.

By Mr. PRICHARD:

Q. What is the limit of size of a toy can?
144 A. Known to the trade, I should say, as small as that cup standing there [indicating].
Q. Is that a toy can?
A. I said the size of that in a mug. (Witness referred to small cup with "Forget me not" in gilt upon it.) There are none here that I can *you* show you by.
Q. So that you think that anything larger than that in a mug is not a toy can?
A. I know nothing about the American trade. They may call them so.
Q. As far as the English trade is concerned?
A. So far as the importing trade is concerned; yes, sir.
Q. Why is it, if you know, that there is a limit of size to toy cans, and not a limit in size to toy tea sets?
A. I don't know.
Q. How is it that there came to be a limit of size of toy cans in the trade?
A. I suppose people adopted the same idea of them, that as soon as you can use a cup to drink out of it is not a toy.
Q. I have shown you a toy tea set which contains cups which are quite large enough to be drank out of, and you said it was a toy tea set.

A. I said as put up that way it is a toy tea set. As soon as you
145 break it, it is called teas. If it is put up in this way for a child's amusement, it is called a toy set.

Q. You think the reason for the distinction in the trade is the fact that there was the amusement of the children to provide for—you think the distinction in the trade grew up from the fact that they are known as toys in the trade here because they are intended to amuse the children?

A. Yes, sir.

Q. That is why A B C plates are so called?

A. I suppose so.

Q. You would recognize such things as that, although pretty large in size, as being intended for the same purpose, would you not (referring to sample plate)?

A. Also intended for child's use; yes, sir.

Q. So that if you found an article dealt in under the name of toys, both by toy dealers and china dealers, by people who ordinarily sell things for children's amusement, that would aid you a great deal in arriving at a conclusion whether it was a toy, would it not?

A. No; that would not influence me at all.

Q. And yet it would influence you if you found a set like that large tea set put up in a large box together; that you would think would be a toy tea set because that would indicate that it was for a child's amusement?

A. It is not my judgment that is a toy tea set. I only tell you what the trade call it.

146 The COURT. It is not your opinion as to how they ought to be classified, but how they are denominated and classified by the trade.

The WITNESS. He asked me if that was a toy tea set, and I said yes.

By Mr. PRICHARD:

Q. You have spoken of size. Size alone does not indicate whether the thing comes under toy ware, does it?

A. No, sir.

Q. I show you an earthernware cup. That is an after-dinner coffee cup, is it not?

A. Yes, sir.

Q. You have no doubt about that thing not being a toy cup?

A. No doubt.

Q. You have no doubt about that either, have you (referring to sample)?

A. No, sir.

Q. That is not intended as a toy?

A. No, sir.

Q. Quite as small as some things which are toys?

A. Yes, sir; much smaller.

Q. What is it that guides you in determining whether the thing is a toy in trade or not?

A. The use to which it is applied.

147 Q. The decoration on that cup is intended for the amusement of children, is it not?

A. I think not. I think it is for the instruction of children.

Q. You draw a line between instruction and amusement?

A. Decidedly.

Q. The A and B?

A. Is teaching the alphabet.

Q. How about the lines, "A stands for apple which here you can see, and B is for ball as round as can be."

A. That is what is called object teaching. That is to impress upon the mind of the child what is meant by it.

Q. Is it not true that of late years very many of the toys which are made for children are made with the double object of making them learn through their amusement?

A. I believe so.

Q. When you give a child blocks out of which it can make a picture, and there is a practical object on the picture, that is designed to educate the child while it is being amused, is it not?

A. Not in that case, it would not be.

Q. Why would you not think so in that case?

A. Because there is no instruction about looking at a picture. In this case there would be teaching the alphabet.

148 Q. If you have a picture of a locomotive or a steamship or a well-known scene like Fairmount Park, do you not think it would instruct the child?

A. Not unless you get instruction with it and tell them why it is on there.

Q. That is, if it is a thing intended for the amusement of children, and with that giving them instruction?

A. Yes, sir.

Q. Is it not that precisely, the object of the clock and the alphabet on a plate?

A. We differ as to the meaning of the word play.

Q. Is not that designed to instruct a child by leading it in its amusement to learn something, just as the A B C blocks, for instance, instruct while they amuse?

A. This plate instructs the child while it is eating, not while it is playing.

Q. You mean while it is eating, of course the whole time it is at the table, for I presume while the child is putting food into its mouth it is not paying much attention to the alphabet.

A. It uses its eyes.

Q. As to the child at the table, the mother has two objects; first, to feed it, and, second, to keep it amused, so it will not interfere with the other people who are being fed?

149 A. Not always.

Q. There are a large class of toys, are there not, which are miniature articles of use, and which can be used by the child, as for instance, toy brooms, or toy tea sets of large size?

A. Yes, sir.

Q. Toy musical instruments and a variety of articles which are miniature articles?

Q. Yes, sir.

Q. So that the fact that the child does use the thing for a practical purpose does not destroy it from being a toy?

A. Do you mean a musical box, for instance?
Q. There are toy musical instruments, are there not?
A. That is for the amusement only.
Q. Can you not on some of these musical instruments play a tune?
A. Not much of a tune.
Q. You can play a tune?
A. I can not, no.
Q. A child can?
A. Yes, sir.
Q. The fact that it is used for a practical use does not take it out of the class of toys, does it?
150 A. No, sir.
Q. There is something else besides that distinction of practical use which determines whether a thing is a toy or not?
A. I think not, because if the child sweeps with the broom it would not do much sweeping. It is simply an amusement. It would not clean the room. Probably the other way. It is simply a toy. It is simply amusement by immitating the action of the servant girl. I do not think there is any practical use to it. It would still remain in the category of toys.
Q. Take a toy washtub and washboard?
A. The same idea.
Q. You can use those for practical purposes, can you not?
A. Not much; no, sir.
The COURT. In point of fact, this character of inquiry is not calculated to shed any light in this case. It has proceeded in this direction by counsel on both sides. There may be some question of construction for the court, about which I will not say at present, but on the case as opened upon both sides, it presents the question, first, has Congress, in using this language, used the language of commerce. If in commerce there
151 are wares known as toys, without more, unless there is something to interfere with the application of the general rules or principle, the language is to be held to have been used by Congress in the commercial sense, and whatever falls within it is to be dealt with in pursuance of that provision. If the evidence does not show that these articles are known to commerce by that designation, then the terms of the statute are to be taken in their common ordinary sense as found in the dictionary and in common speech. By this course of examination we have witnesses speculating about min'ature toys, what they consider toys, their reasons for it, just as you can get a man speculating about what constitutes a musical instrument or a philosophical instrument. It depends upon the extent of a man's knowledge and education whether his opinion upon such a subject is worth anything or not. If the matter involved is not determined by the usages or the speech of trade, then it is for the court to say what is the meaning of the statute, and it is for the jury to say from the evidence whether or not these things fall within the terms of the statute as expressed. We must inquire into what the trade means by this language, because that will govern. What this gentleman means
152 by the language outside of the meaning of trade, or any other gentleman means, is of no consequence whatever. I might denominate one thing a toy and might give fifty reasons for it, but not one of them would be accepted by anybody else as a sufficient or rational reason.

We are either to be governed by the speech of commerce in this respect, or we are to be governed by common speech, and if we are to be governed by the speech of commerce, we must learn that from the witnesses that commerce in speaking of these articles does call them what the plaintiff here says they are, toys. If it is not so shown, that commerce so denominatets them, then the court is to tell you what the language of Congress is, and you are to determine from that language and a description of these things whether they fall within the terms "toys" or not. I can see the danger of such testimony and therefore call attention to it, but the jury is misled by getting the witness's own personal notion of what is a toy and what is not, and you may have as many notions about that as you call witnesses.

By Mr. PRICHARD:

Q. You say all these things are being entered in the port of New York as earthernware at present, do you?

A. I didn't say so.

153 Q. I understood you to say that these things were being entered in New York as earthenware?

A. I was not asked that question.

Redirect examination by the DISTRICT ATTORNEY:

Q. You have said that this plate could be used for amusement, I understood you?

A. Yes, sir.

Q. What is the chief use to which this article is put?

(Objected to. Objection overruled.)

Q. What is the chief use to which these plates and mugs are put, whether for the amusement of a child, or are they chiefly used as other earthenware mugs are used, for household purposes?

A. They are used for children as other household articles of earthenware are used.

Q. Are they chiefly used for that purpose?

A. Yes, sir.

Recross-examination by Mr. PRICHARD:

Q. What do you mean by that? That they are chiefly used on the table and used not away from the table by the child; that is, they are chiefly used by the child on the table as a plate would be used?

154 A. Yes, sir; as a plate would be used.

Q. Is it not true that when it is used the plate is so constructed and designed that it contributes to the amusement of the child?

A. I do not understand your question.

Q. Is not that plate so constructed and painted and designed that when a child does use it on the table it contributes to the amusement of the child?

A. I have already said that in my opinion it is for the instruction of a child, and not for amusement. While it is eating it is being taught the alphabet.

Q. Do you think that is intended at all for the amusement of the child?

A. I think that it is chiefly intended for its use.

Q. Do you think it is at all for the amusement of a child?

A. I don't know; I can't say any more than I have said.

Q. If you do not think it is at all for the amusement of the child, you can say so.

A. It is pleasing. Anything that is pleasing to the eye would be amusement to the child.

Q. Then you think it is an amusement to the child?

A. It might be.

Q. And educational also?

155 A. The very design shows that it is made pleasing to the eye. Of course it amuses to that extent; any other picture would do as well, of course. Any bright coloring there would amuse the child; the United States flag on it would amuse the child.

Q. When you say that its chief use is for practical purposes, you mean that its chief use is to be used on the table?

A. On the table, or anywhere else, for the purpose of eating off.

Q. I want the jury to understand just what you mean in that regard. We all see that plate would naturally be used to eat off of; there is no question about that. We all see it is used both for the amusement and instruction of the child. I want to ask you whether that amusement of the child is not the reason of that special decoration on the plate?

A. The instruction of the child; yes, sir.

Q. So that design is put on the plate not to aid the child at all in the eating part, the practical use of the plate, but to aid it in its amusement or instruction?

A. In its instruction.

Q. There is no doubt about that being called a toy muffin, is there?

156 A. That is known in the trade as a toy muffin or an a, b, c plate.

Q. It has precisely the same purpose, so far as the lettering is concerned, as that mug has, and the lettering—that is, the lettering on both and the picturing on both—have the same purpose?

A. Yes, sir.

157 W. J. REED, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. You live in Philadelphia?

A. Yes, sir.

Q. You are in Mr. Wanamaker's employ?

A. I am.

Q. Of what department have you the charge?

A. Assistant manager of the china department.

Q. How long have you been in the china business?

A. About fourteen years.

Q. Do you know these articles in your business [handing witness plates and cups]?

A. Yes, sir; I know what they are.

Q. Please state under what name they are bought and sold and used?

A. Child's sets.

Q. When they are sold in this way [cup, saucer, and plate]?

A. Yes, sir.

Q. How are they known to the trade singly?

A. Plates and cups and saucers.

By the COURT:

Q. Only? That is their designation?

A. As I understand it; yes, sir.

158 By the DISTRICT ATTORNEY:

Q. The name as you know it is plate, cup, and saucer?

A. Yes, sir.

Q. When they are sold together as child's sets?

A. Yes, sir.

Q. Are these ever sold together in trade in sets?

A. Yes, sir.

Q. What is this?

A. That is an oatmeal set.

By the COURT:

Q. Has it any other designation?

A. Not when they are sold in sets.

Q. They are sold in sets simply as oatmeal sets?

A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. What is the chief use to which these articles are put [plate, cup, and saucer]?

A. For a child to eat off.

Q. Is its use more for household purposes as other crockery ware is used, or is it used for the amusement of children?

The COURT. Which is the principal use?

A. For children to eat off I should think, as far as I know.

159 Q. Under what name are these mugs bought and sold and used in the trade?

A. Child's mugs.

Q. What are these?

A. As toy tea sets.

Q. To what extent, for instance, is about the business in your department of crockery?

A. I do not know as I would like to give that.

Q. It is very large in dealing and handling these things?

A. Not very large in these particular articles.

Q. In these (small size plates)?

A. Not very large.

Q. In Mr. Wannemaker's establishment they have a toy department, have they not?

A. I believe they have.

By the COURT:

Q. Do you not know?

A. I passed through what I consider is a toy department there, although I know nothing about the toys.

Q. You know nothing about the toys, or only believe it by passing through what you think is the toy department?

A. Yes, sir.

Q. Is that all you know about it?

A. Yes, sir.

160 By the DISTRICT ATTORNEY:

Q. They sell toys in the department, do they? That you know?

A. I suppose they do. They have a toy department there, as far as I know.

Q. The department in which you are is the general crockery department; is it?

A. Crockery and glass and china department.

Q. The toys are sold there, are they not, in your department?

A. Not in our department.

Q. Please state whether or not in your department these articles are sold?

A. We sell cups, saucers and plates. We have not got that particular pattern.

Q. Similar to this?

A. Cups and saucers and plates similar to that.

Q. How about this [showing sample]?

A. We have goods similar to those.

Q. How about this [showing sample]?

A. The same way with that.

Q. You have had them similar to this [a, b, c plate]? These mugs, are they, or are they not, sold in your department?

A. We have some mugs similar to those; yes, sir.

161 Q. I understood you to say that you had been in the business fourteen years?

A. About that.

Q. Have you knowledge, and do you remember under what name these articles were imported prior to the year 1883?

A. No, sir; I do not remember.

Q. State whether you do or do not sell these things in your department (small set in box)?

A. We do not. We have not, as far as I can remember, for two years.

Q. You do not know in what department they are sold, or do you know?

A. I have been told, but I don't know.

Cross-examination by Mr. PRICHARD:

Q. Where were you before you went to Wanamaker's?

A. In Kansas City, Mo.

Q. In what business?

A. The china business.

Q. The retail or wholesale?

A. I had charge of the retail department in a large dry goods house there.

Q. Have you ever been connected with the wholesale business?

162 A. How do you mean being connected?

Q. Have you ever filled a position in a wholesale crockery store?

A. I have never been in a wholesale house employed in the house.

Q. You say that you did sell things like these two years ago (referring to small set)?

A. No, sir; I did not.

Q. In Wanamaker's?

A. No, sir; I say as, far as I know, since I have been there, we have not sold them in the china department.

Q. How long have you been with Wanamaker's?

A. About two years.

Q. Did you not have china toy figures in that department?

A. We have nothing of that kind now, to my knowledge.

Q. Have you had since you have been there?

A. No, sir; not since I have been there, although I have seen toy figures in the crockery business and sold them in other stores.

By the DISTRICT ATTORNEY:

Q. But not from Wanamaker's store?

A. No, sir.

By Mr. PRICHARD:

Q. What is the trade name for that plate?

163 A. As I understand it, it is a child's plate. It might be a five-inch plate.

Q. What is a toy muffin in the trade?

A. I could not answer that question, because I know there are muffins and whifflers. I do not know which is a muffin and which is a whiffler.

Q. I find on these catalogues the words "toy muffins" used several times. You are sufficiently acquainted with the terms of the trade to know what toy muffins are?

A. No, sir.

Q. Are you sufficiently familiar with the trade to say what these various articles of toy ware mentioned in this catalogue are; for instance, I see "toy cans" and "toy ware," "toy plates, toy tea, toy tea sets," etc., etc. (referring to Standard American Price List).

A. I have never bought any of these toy tea sets from that firm. I can imagine what they are.

Q. Can you tell what this is, "toy ware, toy teas"—not "toy tea sets," but of "toy ware and toy teas?"

A. I have not purchased any of those.

Q. I am asking you whether you have sufficient knowledge of the trade to say what that would mean as a trade designation?

A. I have.

Q. What would "toy cans" mean as a trade designation.

164 A. I do not know what a toy can is. I am talking about the price list.

Q. What is toy ware as a trade designation?

A. Toy ware is a ware, as I understand it; a toy set consisting of certain pieces.

Q. A toy tea set is the only thing you know under the name of toy ware?

A. In the trade, as far as I know.

Q. Let me call your attention to the fact that in the catalogue which I hold in my hand there is distinctively a definition of toy ware, and underneath it a distinctive definition of toy tea sets, and so with these other catalogues, and so with the catalogue of Trenton, and with the catalogue you hold in your hand. I ask you if toy tea sets are the only things

known in the trade as toy ware, how you would explain in all these catalogues the fact that there is an additional list of toy ware?

A. I told you, as far as I know, the goods that I have handled and the goods that I handle now.

Q. You do not pretend, of course, to have a sufficient knowledge of the trade to say whether or not these terms are properly used here?

A. No, sir; I have not.

165 WILLIAM BURGES, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. Where do you live?

A. In Trenton, New Jersey. I am in the b'siness of *nab*ufactu'ing earthenware. I am connected with the International Pottery.

Q. How long have you been in that business?

A. I have been in the pottery business over ten years. I was formerly in the importing business.

Q. When did you go into the manufacturing business?

A. In 1879.

Q. Prior to 1879 how long had you been in the importing business?

A. About two years.

Q. You are familiar with these articles of earthenware, are you not? (Referring to samples.)

A. Yes, sir.

Q. State, if you know, under what name they are bought, sold, and used in the trade?

A. As printed earthenware; cup, saucer, and plate.

By the COURT:

Q. And that is the only designation, is it?

166 A. That is the only designation I ever heard until I came down here at this trial. We sell hundreds of them every year. We sell them as cup, saucer, and plate, thousands of them.

By Mr. CARR:

Q. Is there or is there not any special term given to the three when sold together?

A. They are known as cup, saucer, and plate, together. They are sold in that way. "C. S. & P." We invoice them.

Q. What is that designated as in the trade? (Showing plate to witness.)

A. That is an A B C plate.

Q. What are these mugs called?

A. They are called mugs. 36's mugs, about that size.

Q. State, if you know, what is the chief use to which these articles are put?

A. They are for a child's use at the table ordinarily, or can be used for a grown person.

Q. What are these (showing sample to witness)?

A. They are toy tea sets.

Q. Do you make articles like these?

A. No, sir.

Q. Are any of these made in this country?

167 A. Not that I know of, as small as that. We used to make a great many tea sets of a larger size previous to the ruling of Judge McKennan; that threw us out. We used to sell about fifty thousand a year in Trenton, but now the trade has entirely disappeared.

Q. You mean in stuff like that?

A. Yes, sir.

By the COURT:

Q. How long ago did you say that was?

A. I don't recollect. Perhaps three or four years; possibly five years.

Q. Up to that time you say these were made and known as toy tea sets?

A. Yes, sir; packed in that shape.

By the DISTRICT ATTORNEY:

Q. When cups of this size or saucers of this size are arranged in this way [in box], they are then known as toy tea sets?

A. Toy tea sets in a box.

Q. You have said that prior to 1879 you were in the importing business. Do you remember that these articles similar to this were at that time imported into this country? Do you or do you not remember whether articles similar to this were imported?

A. Yes, sir; I remember distinctly there were the A B C plates

168 and mugs, but I never remember them coming in sets—cup, saucer, and plate. That is quite recent, as I remember. I don't remember their coming in that way.

Q. As they did come in the form in which they were imported singly, do you or do you not remember the name under which they were imported?

A. They were imported as printed earthenware.

Q. If there was any change made in the denomination under which these articles were imported, state what that was.

A. I couldn't state that from my own personal knowledge, because I was not in the importing at the time the change was made. They were imported up to 1882 as earthenware. Since that time they have been imported as toys.

Q. Under the name of toys?

A. Under the name of toys, and, as I understand, duty paid on them in that way.

Q. You have been to the toy shop of Mr. Schwarz, in Philadelphia, on Chestnut street, above 10th?

A. Yes, sir.

Q. When were you there?

A. Day before yesterday.

Q. You made inquiry for children's toys in earthenware, did you not?

A. Yes, sir; for toy ware; for toy earthenware.

169 The DISTRICT ATTORNEY. I propose to ask the witness what was shown him in response to that request.

(Objected to.)

The COURT. For the same reason that I ruled against you before I rule against you now. The acts of this man upon that occasion and under the circumstances do not tend to enlighten this jury on the question of the trade designation of these wares. It only bears upon that one aspect of the case.

(Objection sustained. Exception for the Government.)

The DISTRICT ATTORNEY. I propose to prove by this witness that upon inquiry made by him at the Schwartz toy shop for the production of articles similar to these in importation in this suit the response was given him that they did not keep such articles, but only dealt in toy tea sets, and offered to produce him tea sets similar to these [small set in box], and he thereupon purchased these.

The COURT. Was Mr. Schwartz a witness here?

Mr. PRICHARD. No.

(Offer objected to.)

The DISTRICT ATTORNEY. I think that it will be admitted that Mr. Schwartz is probably the largest toy dealer in Philadelphia.

(Objection sustained. Exception for the Government.)

170 The DISTRICT ATTORNEY. It is proposed to prove by this witness that upon a visit to the establishment of Frymire and Edwards, yesterday or the day before, Mr. Frymire having been called as a witness here for the plaintiff, that Mr. Edwards, his partner, said that the articles in suit in importation were not bought and sold as toys, the offer being coupled with the offer to show that the Government has attempted to subpœna Mr. Edwards on three separate occasions, and that Mr. Edwards is reported to be out of the city.

(Objected to.)

The COURT. I have no hesitation to say that these offers, if admitted, the evidence would be entitled to no respect whatever, for it does not have any proper bearing upon any question involved in the case. It would be the mere declaration of somebody outside, who can as well be brought here and sworn and be examined.

(Objection sustained. Exception for the Government.)

Cross-examination by Mr. PRICHARD:

Q. Let me clear up one statement which you have made in your testimony. You have said, as I understand you, that the Trenton
171 manufacturers made these large toy tea sets, and that in consequence of a ruling of Judge McKennan's that from that time henceforth the trade has declined. Do you not know as a fact that the ruling was made over three years ago, that a writ of error was taken by the Government, and that the Department refused to acquiesce in it, and that it has only been within a year that the Supreme Court has finally affirmed the judgment. Is not that so?

A. I do not know.

Q. The Trenton manufacturers made these large toy tea sets and called them toy tea sets.

A. Hardly as large as that.

Q. That is an American toy set, is it not?

A. I can't say anything about that set. It is American.

Q. You made pretty large toy tea sets?

A. Not as large as that. There is a toy tea cup and saucer the size we made. The white one [referring to sample].

Q. At the same time you and other Trenton manufacturers endeavored to get the Department to refuse to admit large toy tea sets in here as toy tea sets, were you not?

A. Yes, sir. We held they should come under the head of earthenware.

Q. You thought when imported they should come under the head of earthenware?

172 A. Yes, sir; because we substituted these for after-dinner coffees. If an order came in for after-dinner coffees we sold them for after-dinner coffees.

By the COURT:

Q. Were they known in the trade as toy tea sets?

A. If they were put in boxes and sold as sets they were sold as toy tea sets, but if sold individually, they were sold as after-dinner coffees.

By the DISTRICT ATTORNEY:

Q. Or sold by the dozen?

A. Yes, sir; they were interchangeable.

By Mr. PRICHARD:

Q. That is, you sold them at a less price when you sold them as toys than when you sold them as after-dinner coffees?

A. No, sir; we sold them at the same price; sold them at list price.

Q. Do you remember Dale & Davis Prospect Hill pottery?

A. Yes, sir.

Q. You see, "toy plates, toy tea plates, bowls, sugars, teas unhandled," and so on?

A. Yes, sir.

Q. What were those toy teas unhandled?

A. They were about the same as these, without a handle.

173 Q. But not put in sets?

A. No; as designated there they were a separate piece.

Q. These c'talogues were sent out to the trade as offering these things separately as well as in sets?

A. They were never bought that way. There might be a few sets broken and they would send back an order for matches to match. They were sold in sets always.

Q. Why was this put there elaborately on the catalogue?

A. So they could tell just how much an individual piece would cost if they did break some.

Q. They are not individual pieces. These are teas unhandled by the gross?

A. Yes, sir.

Q. Why do they sell teas unhandled by the gross?

A. Because that is the way we all sell them. That is the way we sell all teas. We do not sell them by the individual pieces.

Q. So that at that time you were offering things of this kind by the gross as well as tea sets, and you were endeavoring to have the Department refuse their admittance as toy tea sets here.

A. Yes, sir; we were refusing to have the Government admit them that way, but we did not sell them by the gross.

Q. You say manufacturers were selling them by the gross?

174 A. I don't think so. I think that is merely a price on there to designate as they call them. They might have made them up in other toy tea sets of different sizes.

By the COURT:

Q. Had they a common, well understood name in the trade?

A. When they were grouped together in a set, they did.

Q. You have said they had one name when grouped in a set, and another name when not?

A. Exactly so.

By Mr. PRICHARD:

Q. What was the meaning of "toy teas unhandled, $7.50 a gross?" What did that trade name mean? It meant this thing without a handle, did it not?

A. It meant that without a handle. If they wanted a single piece it was to be one-sixth of that amount.

Q. A gross is twelve dozen?

A. No; in our trade it is six dozen.

Q. If they wanted a single piece it would not be one-sixth; it would be one seventy-second?

A. Yes, sir.

Q. Do you mean to say that the Trenton manufacturers sold them by the single piece?

A. Yes, sir; to match up; if there was any matching up to do.

175 Q. You think when a catalogue was printed which said "toy plates so much per dozen, toy *yea* sets so much per dozen, toy teas unhandled so much per gross, toy teas handled so much a gross," that that toy teas unhandled so much a gross was intended to tell the trade if they wanted a single piece to replace a piece they could get it there?

A. Yes, sir; I mean to say that was the fact. They were made by the sets as toy tea sets, and *b*ot by the gross.

Q. Why was it they said toy teas unhandled so much a gross?

A. That is the way of doing it.

Q. Have you got one of your catalogues?

(Witness produces catalogue.)

Q. I see here toy teas unhandled, $5.75; handled, $7.50; teapots, sugars, creams, slop bowls; then follows toy sets. You separate into three departments your catalogue, as I understand it, your toy ware, your toy teas, and your toy sets?

A. Yes, sir; on this catalogue.

Q. This is your catalogue?

A. Yes, sir.

Q. It is dated November 1, 1879?

A. That is an old one. The newer c'talogues we have not them in.

176 Q. Before you went into the manufacturing pottery business what house were you with?

A. William Burgess & Co., of New York.

Q. Wholesalers?

A. Yes, sir.

Q. Have you had sufficient experience in the trade to tell us what a toy muffin was before 1883?

A. Yes, sir.

Q. What was a toy muffin?

A. I do not remember ever anything coming in as a toy muffin previous to that time.

Q. I ask you whether you have had sufficient experience in the trade to tell what a toy muffin was prior to 1883?

A. I say there was no such thing as a toy muffin prior to 1883 that I know of.

Q. You had a pretty good experience in the trade?

A. Yes, sir.

Q. Did you ever hear of the Brownhill Pottery, Tonsdale, Staffordshire, England?

A. Yes, sir.

Mr. PRICHARD. I am going to ask the witness whether that was a term used at that time?

The WITNESS. I know nothing about the importing trade at that time, in 1883; I went out of the trade in 1879.

177 By the COURT:

Q. Did you know anything about what a toy muffin was at that time when you went out of trade?

A. No, sir; they were known as A B C muffins.

Q. That you knew?

A. Yes, sir; or motto muffins.

By Mr. PRICHARD:

Q. What was an A B C muffin?

A. It was similar to what you showed me.

Q. Did you not say to the court, on examination in chief, that the only name that this plate was sold by was an earthenware plate?

A. A B C.

Q. Did you say A B C?

A. Yes, sir.

The COURT. He said motto muffin.

A. Some of the A B C plates had a motto at the bottom or a picture, and others merely had colored letters around the sides.

By Mr. PRICHARD:

Q. You have had enough experience in the trade also, I presume, to tell us what was known in the trade before 1883 as a toy can?

A. Yes, sir.

178 Q. What was a toy can?

A. One of these lettered mugs.

Q. Did you not say to counsel or to the court a few minutes ago that the only name you knew these by was mugs?

A. No, sir; I didn't say the only name, because they have half a dozen names.

Q. That was a toy can?

A. Yes, sir; that with the letter A for apple and B for ball.

Q. Prior to 1883 that was a toy can?

A. Yes, sir; also a motto mug.

Q. Are you familiar with these general earthenware price lists of English manufacturers?

A. No, sir; I don't recognize that. I don't remember having seen these.

Q. Are you sufficiently familiar with the trade to tell us what the word "toy cans" in here means? Does it mean just what you stated?

A. I should take it to be so; yes, sir.

Q. Do you mean to tell this jury that the only thing known in the trade as a toy can was a mug which had lettering on it?

A. A letter or motto, or letters, as you see them there.

179 Q. Or something to indicate that it was for the amusement of children. Am I not right?

A. That it was a child's mug. It did not amuse the child particularly.

Q. Something to indicate it was a child's mug?

A. Yes, sir.

Q. It was the technical name in the trade for a child's mug?

A. That was one of the names; yes, sir. The painted mug was always a painted and dipped mug. I never heard them called toy can. One is a luster mug and the other a painted and dipped mug.

Q. You have produced a catalogue which I think has the word "toy ware" in it. I find it in both of these American and English catalogues. What, before 1883, did you understand to be the limit of the word "toy ware?" What was toy ware in the trade?

The DISTRICT ATTORNEY. There is one August 31, 1883, which does not have the word "toy ware" in it.

Mr. PRICHARD. That is since the question has arisen between the importers and the manufacturers.

The DISTRICT ATTORNEY. That is since the ruling of the attempt to get these goods in as toys.

180 By Mr. PRICHARD:

Q. Here is your own catalogue of November 1, 1879 with the word "toy ware" in it. I ask you not simply what that means in that catalogue, but what the toy ware meant generally in the trade? It is a term I find in all these catalogues.

A. Toy ware comprised toy tea sets similar to the little ones you have on the table like that [small set in box]. And when toy ware was spoken of it has always conveyed to the mind of the dealer in American goods of sets similar *sim'lar* in size to that cup and saucer (white), and the second size plate in that nest of plates (white). In imported goods they have run from the small size up to the large size tea sets.

By the COURT:

Q. Up to what size?

A. Up to almost an indefinite size. They seem to be getting larger every year.

Q. In the American market and in domestic goods it signifies such as you manufacture?

A. Yes, sir; always in sets. Taken individually, that was a cheese plate and that an after-dinner coffee.

181 By Mr. PRICHARD:

Q. Tell the jury whether the imported goods, the toy ware, included toy cans?

A. I didn't get exactly what you mean by that.

Q. You have said you knew what toy cans were, and have pointed them out. I ask you whether they do not come within the general trade definition of toy ware?

A. No; not of toy ware. Toy ware is such as what we consider makes up a little child's toy tea set, but does not come under the head of toy ware.

CHARLES COOK, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. Where do you live?
A. Trenton, N. J.
Q. In what business are you?
A. In the pottery business; manufacturing pottery.
Q. Of what establishment?
A. The East Trenton Pottery Company.
Q. How long have you been in the business?
A. Over twenty years.
Q. In the manufacturing business?
A. Yes, sir.
182 Q. You are familiar with these articles that you see here on the table, are you?
A. Yes, sir.
Q. Please state the name under which these articles are bought, sold, and used in the trade?
A. We call that a plate, a five inch plate [indicating]; that is a cup and saucer [indicating].

By the COURT:

Q. No other name?
A. We make a dozen different patterns that we would call——
Q. The question is not what you make, but whether they are known to the trade?
A. The trade calls it an ovide tea.
Q. That is the name by which the trade knows it?
A. Yes, sir. That is an ovide tea.

By the DISTRICT ATTORNEY:

Q. These mugs that I show you, under what name are they bought, sold, and used in the trade?

Mr. PRICHARD. You better examine this witness as to his capacity.

By the COURT:

Q. Have you bought and sold this ware, or simply manufactured?
A. Manufactured and sold.
Q. Have you had anything to do with the foreign trade?
183 A. No, sir. Except in competition with them.
Q. Have you had such business inquiries with the foreign trade as to know precisely what it is?
A. I do not know all their terms and phraseologies. I have been in competition with them.
Q. Do you know how merchants in this country designate the different kinds of ware, earthenware, toy ware, glassware, china ware, etc.?
A. I know a good deal about it.
Q. How long have you been in the business?
A. Twenty years.
Q. Carrying on for yourself?

A. Yes, sir. In the same place.

The COURT. What counsel are inquiring of is not what you call these things yourself, but by what names they are known to the trade at large.

The WITNESS. The counsel asked me what I called that.

The COURT. Not what you call it, but what is it called by persons in the trade?

By the DISTRICT ATTORNEY:

Q. Say, if you know, the name by which these cups or mugs go in the trade and are bought and sold?

A. We call it a 42's mug.

By the COURT:

Q. Do you know how it is called by others in the trade?

184 A. Yes, sir; we sell them. Sometimes we sell them as 42's mug; not just that decoration; we put various designs on it—perhaps hundreds of decorations—but that is the size of a 42's mug. You will find it on the various Trenton price lists and American price lists as 42's mug.

By the DISTRICT ATTORNEY:

Q. How is it known in the trade? Is it known in the trade in that way?

A. 42's mug; yes, sir.

Q. How about this one?

A. That is an earthenware mug of the same size, but differently decorated.

Q. Under what name is it bought and sold in the trade?

A. We make them and sell them as 42's mug.

Q. This one?

A. The same. They are all about the same size.

Q. So far as you know, are they all bought, sold, and used in the trade as toys?

A. We have never sold them as toys. We have never been asked to.

Q. So far as you know, in the trade?

A. I suppose those with fancy lettering, A, B, C, and so on, may be used that way. Not that I know of, as we understand it.

185 Q. What is the chief use to which these articles are put?

A. Domestic uses.

Q. Are they all bought and sold in the trade, so far as you know, under the name of toys?

(Objected to.)

Mr. PRICHARD. He has said he can not tell.

The WITNESS. I said we did not do it.

By the COURT:

Q. Do you know whether other people do in the trade? By your trading with others do you know whether these things are called toys or not?

A. No.

By the DISTRICT ATTORNEY:

Q. Do I understand you to say you do or do not know?

A. I know, but the judge says I am not at liberty to say what I know. It has been proven here to-day that they are imported as toy mugs.

The COURT. We want any information that you can give us, but what other men have told you is secondhand.

The WITNESS. I have no other way of knowing except what people tell me.

By the COURT:

186 Q. Do you know how other men engaged in this trade call these articles? You have said how you call them and how you have sold them, but do you know how other men who are engaged in dealing in these articles denominate them?

A. Only by what I hear them say. I heard them say here to-day.

The DISTRICT ATTORNEY. He does not mean that.

The WITNESS. At other times. I do not import any.

By the COURT:

Q. Your connection with the trade has consisted entirely of manufacturing goods of this kind and selling them?

A. Yes, sir.

Q. When men have ordered these goods of you, by what name have they ordered them?

A. 42's mugs invariably.

Q. And not by any other designated name?

A. No, sir.

Q. When you have sold them you have sold them by that designation?

A. Yes, sir.

Q. Do you know anything more about it than that?

A. Yes, sir; if you will allow me to explain. When they are white they are 42's mugs. When we decorate them we have a number for that decoration. We have decorations running up to the thousands. If they want a particular decoration, they will tell us decoration 4,000, say.

187 Q. They are so known by other people?

A. Yes, sir.

Q. And not anything else?

A. No, sir; 42's mug decorated such a number.

Q. And if a person is engaged in the trade, either wholesale or retail, a merchant who wants to buy of you, that is the way he designates them?

A. Yes, sir.

Q. He does not designate them in any other way?

A. No, sir.

Cross-examination by Mr. PRICHARD:

Q. Did you ever make mugs with these letters and similar decoration on them to that (showing mug)?

A. No, sir; not very similar to that.

Q. What style of decoration do you put on your 42's mugs?

A. A great many different styles of decoration.

Q. Any decoration which specially fits them for the amusement of children?

A. We have got decorations, it seems to me, somewheres here, that cup, sauces, and plate. I do not know that we have lettered any.

Q. That is about the style of decoration on your 42's mugs?

188 A. We put that style and thousands of others. Similar styles. We have decorated them like those you have. We may have lettered them, but I have no recollection.

Q. It is the similarity to that general style of decoration?

A. Yes, sir.

Q. Do you know anything of this kind of plates with the A, B, C, and lines and things?

A. No, sir.

Q. You have spoken about these teas as ovide teas. Have you one of our catalogues with you?

A. No; I think you will find them in that catalogue.

Q. Do you make ovide teas?

A. Yes, sir.

Q. If a man sent to you for 144 gross of ovide teas, you would not send him that size cup, would you, for example?

A. Our ovide cup is very like that in shape. I make a smaller one and a larger one. I don't think we make one *one* just exactly that size, but we make one just a little larger. We make tea cups a little larger than that.

By the COURT:

Q. Ovide?

A. Different shapes of mugs; ovide, Saxon, St. James, etc., various names.

189 By Mr. PRICHARD:

Q. Have you ever made an ovide tea cup the same as that?

A. Yes, sir.

Q. Many of them?

A. Yes, sir.

Q. What kind of decoration did they have on them?

A. They vary wonderfully. The decorations have got up into the thousands. We number each decoration.

Q. Did you ever make ovide teas with a decoration of that description, as inferior as that?

A. That is underglazed decoration, put on the bisque. We decorate on the gloss or glaze.

Q. Yours is a finer ware, is it not?

A. We have made as common as that.

Q. You have made ovide teas as common as that?

A. Yes, sir; I think we have.

Q. Of this size?

A. We very likely have.

By the COURT:

Q. I want your best recollection as to whether you have ever made ovide teas as small as that and as inferior as that.

A. Yes, sir; I think we have got them in the pottery to-day,
190 some no better than that, probably, but not decorated.

Q. How about the decorated ones? Have you ever made any decorated with as inferior a decoration as that, of that size?

A. No, sir. I said that we had them in the pottery to-day, but perhaps not decorated.

By the DISTRICT ATTORNEY:

Q. Not yet decorated?

A. Not yet decorated.

By Mr. PRICHARD:

Q. Have you ever made or sold ovide teas as small as that or as inferior ware and decorated with as inferior decoration?

A. We never decorate any underglazed; we have made as inferior a ware as that. Decorating is one process with us. After the goods are finished, than we decorate them. That decoration was put on the bisque and glazed afterwards.

Q. Is it inferior or better than yours? I mean considered in the size. Is it more costly than yours?

A. There is not a great neal of difference about that.

Q. Is it more or less?

A. I think we have some people in Trenton doing it that think they can do it cheaper, but others think they can not do it as cheap.

191 Q. You say you do not do it underglazed, and this is underglazed, I understand you. Which is the most expensive and superior decoration, the underglazed or the kind that you put on?

A. We claim that our way of doing it is the best.

Q. Is it not generally recognized in the trade as the better decoration, the most expensive decoration, of the two?

A. We can decorate them on the glaze as cheaply as that; but decorating them on the glaze admits of all the decoration you have a mind to put on, gilt and so on.

Q. You generally do gild them, do you not?

A. Yes, sir.

Q. What is a toy can?

A. I don't know.

Q. You never heard the term?

A. Until I came here to-day I never heard tell of it. I don't remember that I ever have.

Q. You do not mean to tell this jury that it is not a well-known term in the earthenware trade, do you?

A. I do in this country; that is, the manufacturers in this country.

Q. You do not mean to tell them it is not a well-known term in connection with imported goods, and has not been for the last twenty years?

192 A. I am not telling them anything about that. I have no recollection of ever hearing of a toy can until I came here to-day.

Q. Do you not make it your business to examine English catalogues?

A. No, sir.

Q. Are you not familiar with the catalogues of English manufacturers of pottery?

A. No, sir; I am not familiar with them.

Q. Therefore you do not know the trade terms that are used in the importing trade?

A. I don't care to know.

By the DISTRICT ATTORNEY:

Q. Among these thousands of decorations that you use have you or have you not decorations similar to that [mug with bands]?

A. We have decorations similar to that with bands.

Q. And this [marble and gold]?

A. Yes, sir; we decorate that all over.

By the COURT:

Q. In the same way decorated on the underglaze?

A. We have never decorated much under the glaze.

Q. These articles are decorated under the glaze?

A. I should think so. [After examination.] That is decorated under the glaze.

Adjourned until Monday morning, Octo. 14, 1889, at 10:00 a. m.

193 JAMES MOSES, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. You live in Trenton?

A. Yes, sir.

Q. What is your business?

Q. At present I am engaged in manufacturing earthenware.

Q. What is the name of your company or firm?

A. The Mercer Pottery.

Q. How long have you been in business at the Mercer Pottery?

A. Since 1875, in that place.

194 Q. How long have you been in the trade before that?

A. A little over twenty-five years.

Q. What branch of the business were you in before you went in the manufacturing business?

A. I have been in all branches, from shovelling coal to owning the property. I was seven years travelling selling these goods to dealers and importers. I was seven years a travelling salesman.

Q. Selling these goods as are put in here as evidence and samples of such?

A. Something of that kind.

Q. Did you or not at that time come in contact with the imported trade?

A. Yes, sir.

Q. Have you or have you not knowledge of the terms used in the pottery trade?

A. Certainly.

Q. Notice these samples that have been produced here and state whether or not you recognize them as articles that are bought and sold in the pottery trade.

A. Yes, sir.

Q. Please state, if you know, the name under which this article
195 is bought and sold and used. I show you a cup and saucer the back of which is marked "tea drinker," referred to by the plaintiff.

A. That is an earthenware cup and saucer.

By the COURT:

Q. That is the only name. The common name?

A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. Is it or not known under that name as a cup and saucer, by which it is bought and sold and used in the trade?

A. Yes, sir; the name is teas. Teas means teacups and saucers, the same as coffees means coffee cups and saucers.

Q. I show you plate marked tea drinker. Please state under what name this article is bought and sold and used in the trade.

A. As an earthenware plate.

By the COURT:

Q. That is the common name?

A. I have heard it called a muffin. The common name is plate in this country for eating pie off or things of that kind.

196 Q. You have heard it called muffin, but its common name is plate?

A. Yes, sir; I think the term in England is muffin for that size. They have peculiar names for different purposes.

By the DISTRICT ATTORNEY:

Q. These have been referred to as A B C plates. Please state under what name these articles are bought and sold and used in the trade.

A. A B C plates; earthenware A B C plates.

Q. I show you these five mugs which have been produced by the plaintiff. Please state under what name they are bought and sold and used in the trade.

A. Earthenware cups or mugs. Tom and Jerry, or for children to drink out of. Tom and Jerry size are those. This is the size they generally use for Tom and Jerry. That is a hot drink that would probably break glass, if it was put into glass. I see mugs there that we sell for that purpose about the same size, those three sizes there [white]. Those are what we sell for Tom and Jerry mugs. Probably hot lemonade, that might crack the glass.

Q. What is the chief use to which these earthenware articles are put?

197 A. Which?

Q. These that I have refer'ed to, produced by the plaintiff?

A. All of them, regular table use. They are used for ordinary use.

Q. What are these articles known as in trade [small sample]?

A. Toy sets or toys.

By the COURT:

Q. Known as toys?

A. Yes; those little things; playthings.

Q. State whether there is a ware or something in the trade that is known to the trade as toys?

A. Do you mean the material?

Q. No; I mean the manufacture.

A. Nothing except those little toys that they use to play with—playthings.

Q. They are known to the trade and by the trade as toys?
A. Yes, sir; certainly.
Q. Then the trade has that name of toys?
A. Yes, sir.
Q. You say it applies to things like that?
A. Yes, sir.

198 By the DISTRICT ATTORNEY:

Q. These toy sets?
A. Yes, sir; put up in that shape.
Q. Or these?
A. Yes, sir; or even larger. The same as some of the others.
Q. The decoration upon these articles produced by the plaintiff has been referred to here as indicating that they are toys. I show you certain saucers and plates having on them certain decorations, and ask you whether or not you know by whom these earthenware articles were made?
A. Some of them were made by me in my establishment.
Q. I show you a cup, saucer, and plate, having on it the figure of a woman and the word "Summer," the decoration; the saucer having on it the figure of a man with the word "Reaper," and the cup having on it a certain decoration with the word "Winter." Please state whether or not that was an article made by your firm.
A. Yes, sir; the engraving was gotten up by me and the ware was made by me, and the whole business was done in my manufactory.

199 Q. State under what name these articles are bought and sold and used in the trade.
A. Regular tea set or tea ware; never put under toy ware.

By the COURT:

Q. And never called toys?
A. No, sir.

By the DISTRICT ATTORNEY:

Q. I show you a cup and saucer, the cup of which has on it a certain decoration, and the saucer having on it New Jersey, the battlefield of the Revolution, with a certain design. Do you know by whom that was manufactured?
A. That was manufactured by the establishment I was partner in before I went to the Mercer Pottery, during 1876, during the exposition.
Q. What establishment was that?
A. The Glasgow Pottery Company.
Q. Please state, if you know, under what name that article is bought and sold and used in the trade.
A. It was a cup and saucer that was used at these Centennial tea parties. We made a great many for Mrs. Gillespie's parties during the exposition here. That was made for a party, tea party. Put Jersey mottoes

200 instead of John Hancock mottoes that we had in the Centennial.

Q. Was it ever bought and sold and used, so far as you know, as a toy for a plaything for children?
A. No, sir; never.
Q. I show you a plate and bowl and a pitcher. Please state, if you know, under what name these articles are bought and sold and used in the trade.

A. Children's set for mush and milk, or bread and milk, or something of that kind.

Q. I think that you went to Wanamaker's place, at Thirteenth and Market street, during last week, or pending this trial, before the case was reached?

A. Yes, sir.

Q. Please state whether or not you saw there a department known as a toy department.

A. Yes, sir.

Q. Did you or not make inquiry in that department for toy earthenware goods?

(Objected to. Objection sustained. Exception for the Government.)

The DISTRICT ATTORNEY. It is proposed to show by this witness that he visited the establishment of John Wanamaker, at Thirteenth
201 and Market streets, and that upon inquiry at the toy department therein was informed that the articles produced here in evidence by the plaintiffs were not sold in that department as toys, but were to be found in the regular china or crockery department of that establishment.

(Objected to by the plaintiff. Objection sustained. Exception for the Government.)

The DISTRICT ATTORNEY. It is also proposed to show by this witness that upon that occasion the goods shown him in the toy department as children's toys were similar to the toy tea sets produced here by the defendant.

(Objected to. Objectioned sustained. Exception for the Government.)

The DISTRICT ATTORNEY. It is also proposed to show by this witness that thereupon he went to the department in John Wanamaker's establishment known as the crockery or earthenware department, and there was shown the articles produced here in evidence by the plaintiff as samples of this importation.

(Objected to. Objection sustained. Exception for the Government.)

202 By the DISTRICT ATTORNEY:

Q. You have known of the importation of articles similar to the samples produced here by the plaintiff prior to the year 1883, have you not?

A. Yes, sir; I have.

Q. State, if you know, under what term these articles, prior to the year 1883, were imported into this country?

A. As earthenware.

The COURT. If you know from your dealing with the trade, not from what men told you?

A. My inquiries in the trade in selling something of the same character; they would commence to figure with me to see whether mine was the cheaper or the imported. That would bring out how they were imported, and it was generally known in the trade that they were earthenware and always imported as earthenware.

The following question read:

Q. "State, if you know, under what term these articles, prior to the year 1883, were imported into this country."

Q. You say you were buying and selling, or selling for houses, the domestic ware?

A. Yes, sir; in competition with these.

203 Q. And that brought you into connection with men who were selling the foreign ware?

A. I was talking to nearly every dealer of earthenware of every kind in the country every few months on such matters for seven years.

The COURT. If in your inquiries, such as you have stated, you learned how the trade designated these articles, and I think you have such knowledge, and you may state it.

The following question read:

Q. "State, if you know, under what term these articles prior to the year 1883 were imported into this country?"

A. I know in the way that I spoke of. I did not see the invoices.

By the DISTRICT ATTORNEY:

Q. Under what term?

A. As earthenware.

By the COURT:

Q. That is the term by which you heard them designated in the trade?

A. Earthenware cups, saucers, and plates; imported as earthenware; made at earthenware factories.

By the DISTRICT ATTORNEY:

204 Q. State whether or not, prior to 1883, you ever at any time heard them called in trade as toys?

A. Never that kind of articles.

Q. I am speaking only of articles similar to the articles produced by the plaintiff here.

A. No, sir.

Q. When did you first hear them called in trade as toys? I am speaking only of the samples produced by the plaintiff.

A. Never until here in this building.

Q. When was it? About what time?

A. Within the last few days.

Q. As to the manufacture of articles similar to these in this country (plate, cup, and saucer), are they made here now or not?

A. Yes, sir. They might not be that particular decoration; similar to those. Very few people make the same decoration; similar to those.

Q. In what quantities are they made?

A. By the thousands of dozens.

Q. Prior to the year 1883 were they made in larger or smaller numbers than to-day? I am speaking of the chief articles produced by the plaintiff.

A. I do not know as there is much difference about that.

205 Cross-examination by Mr. PRICHARD:

Q. I understand you to say that you have had a pretty good knowledge of the English trade as well as the American?

A. Yes, sir.

Q. Do I understand you to say to the jury that the only thing known in the trade as toy ware were those little sets in 1883?

A. No, sir. Not in 1883.
Q. So you have heard the word frequently, toy ware?
A. Yes, sir. Anything that is a plaything.
Q. What else was made in 1883 in toy ware?
A. Toy piano or toy rocking horses.
Q. What else in earthenware?
A. I do not know the particular things.
Q. Are you unable to tell this jury what else was known as toy ware in the earthenware business?
A. I do not know of anything else only what was regular toys. I do not remember just now. I do not understand what you mean by a toy, except a real plaything.

Q. Let me refresh your recollection. I hold in my hand a
206 general earthenware price list of the English trade in 1873, ten years before 1883. Tell me what was the meaning of the English trade of toy teas, handle plain?
A. Toy teas.
Q. What was a toy tea?
A. Toy tea cups.
Q. What was a toy tea as distinguished from a toy tea set?
A. The one was a cup and saucer, and the other was a full set.
Q. What was the cup and saucer there referred as toy teas?
A. A small cup and saucer.

By the COURT:

Q. About how large?
A. Something like that white one.

By Mr. PRICHARD:

Q. Like this one?
A. Yes, sir; or smaller.

By the COURT:

Q. There was imported and known as tea cups and saucers and plates like that?
A. This is a toy size. Before 1883 this was the toy size plate. That was the regular toy plate before 1883. That is the toy cup, saucer,
207 and plate. That is the size they made in 1883. It may have grown.
Q. That is as it was known in the import trade in 1883?
A. Yes, sir.

By Mr. PRICHARD:

Q. So that there were toy teas known in the import trade long before 1883?
A. Yes, sir; certainly; but they were imported as earthenware.
Q. Let us come to the plates. What was the toy muffins seven inches. I show you the English catalogue which refers to them. Toy muffins four-inch, five-inch, and seven-inch this Brown Hill pottery company of 1883 had. What were those?
A. I never saw them to my knowledge.
Q. You recognize the Brown Hill pottery company, do you?
A. Yes, sir.

Q. Pretty large concern?
A. Yes, sir.

By the COURT:

Q. Have you no understanding of what that signified?
A. No; I do not think they were.
208 Q. You say those were imported?
A. No, sir; those are domestic.
Q. But you say that similar ones were imported?
A. Yes, sir; in regard to size.

By Mr. PRICHARD:

Q. Let me show you again this 1873 English catalogue. What were toy cans?
A. I cannot tell what special name the English people gave them.

By the COURT:

Q. When they came to this country. Did you use imported cans called toy cans?
A. I never knew them as toy cans. I have heard little bits of mugs were sometimes called toy cans.

By Mr. PRICHARD:

Q. Are not these catalogues which I have shown you gotten up by the English manufacturers for the purpose of letting people know who want to buy and import, know what their prices are?
A. I suppose they are.

By the COURT:

Q. What they have to sell?
A. Yes, sir.

209 By Mr. PRICHARD:

Q. When were you a partner of the Glasgow Pottery Company?
A. Before 1875.
Q. That is one of the catalogues of the Glasgow Pottery Company, is it not?
A. I believe it is.
Q. They have there, have they not, toyware, toy plates, teapots, sugars, creams, slop bowls, toy teas unhandled, toy tea sets?
A. Yes, sir, and so have I.
Q. What are your toy teas? Like these? (White.)
A. Yes, sir; that is one of them.
Q. Do you also sell them for after-dinner coffee cups?
A. No, sir.
Q. You have the same thing for toy teas as you had for after-dinner coffee cups?
A. No, sir; I have a little different.
Q. How many styles of toy teas have you?
A. Only one.
Q. And that is this or a little bigger than that?
A. That size. (White.)

Q. You have seen this large assortment of things which come from Trenton, have you not?

210 A. Yes, sir.

Q. Is this the nearest that you have been able to come to our toyware? (Decorated cup, saucer, and plate.)

A. In earthenware?

Q. Yes.

A. I suppose it is. It is the nearest I make.

Q. Look at that cup and saucer and say whether that saucer was made to fit that cup.

A. No, sir; this is a fruit saucer.

Q. Let us get the saucer that belongs to the cup.

A. There is no saucer there belonging to the cup.

Q. Whym when you took the trouble to bring the plate and cup, did you not bring the proper saucer?

A. I brought other saucers. It was only to show the decoration.

Q. That is the ordinary size tea cup, is it not?

A. Yes, sir.

Q. These things are sold for service on the table?

A. Yes, sir.

Q. They are not sold as child's sets?

A. Yes, sir; if you want them that way.

Q. You never knew them to be sold that way, did you?

A. Yes, sir; I have sold them.

Q. Have you sold a cup, plate, and saucer as a child's set?

211 A. Yes, sir.

Q. Many?

A. Yes, sir; hundreds of them; thousands of them.

Q. Please look at that catalogue of Glasgow pottery and see if you find any term in there as "child's set?"

A. I do not think it is in this.

Q. Please look at that and say under what head you find you would sell these goods; where do these goods or any goods similar to them come in that catalogue?

A. They would come in under "decorated-ware scale."

Q. Where is it?

A. Decorated-dinner-sets scale.

Q. One dozen plates round, one dozen plates round, one dozen deep, one dozen individual butters, and so on, making one hundred and twenty-five pieces altogether. They come under that head?

A. Yes, sir.

Q. That is the size saucer that ought to go with that cup, is it not? (Decorated.)

A. Yes, sir; something like that.

Q. Why did you not bring out a cup and saucer like that when you brought these here?

A. Because I did not think it was necessary.

212 Q. Why did you think it was necessary to bring a smaller size saucer than a fruit saucer?

A. Because it has different decoration from the sup; to show it was part of a tea set.

Q. You have said this is called a child's mush and milk. Do you have any different sizes for child's mush and milk, such as child's mush and cream?

A. No, sir.

Q. You have not put it in here as child's mush and milk.

A. I was not giving evidence from the list. I was asked what it was called in the trade.

Q. When you are making up your catalogues do you not make them up for the trade?

A. Yes, sir. I think those are known as mush and milk sets all over the trade and nobody can object to that.

Q. You used the word "child's?"

A. For children's use at the table of course.

Q. You see some difference in the size of those two cups, do you not?

A. Yes, sir. I did not say this was as small as that.

Q. Have you any of this set as small as that?

A. No, sir.

213 Q. You do not know of any piece in a dinner set or tea set that corresponds with this, do you?

A. Yes, sir.

Q. Let me show you your catalogue and point out to me the cups that correspond with that in size.

A. After-dinner coffees.

Q. Do you think that you ever sold that cup and saucer for an after-dinner cup?

A. Yes, sir. I have drank after-dinner coffee out of it.

Q. Do you think that that would be known in the trade as after-dinner coffee?

A. I think it can be used for that.

By the COURT:

Q. The question is whether that is known to the trade as such.

A. I believe it is.

Q. You believe it is known by that designation?

A. As far as my information goes.

By Mr. PRICHARD:

Q. You have brought here some after-dinner coffee cups, have you not?

A. No, sir; I have not.

Q. After-dinner coffee cups are usually different shape from that, are they not?

214 A. I make them in three or four shapes to match the dinner set.

Q. Suppose that you sent up to your place to-morrow for after-dinner coffee cups; what have you got like that in your place that corresponds to it?

A. I have got after-dinner cups.

Q. What do you sell your after-dinner cups?

A. The price?

Q. Yes.

A. According to the style.

Q. What is your lowest decorated after-dinner coffee cup?

A. I cannot tell without figuring it on discounts from the list.

Q. Can you not even give a guess?
A. I can guess, of course. Anybody can guess.
Q. You have not got one of your catalogues here?
A. No, sir.
Q. Take this catalogue of John Moses, in 1877. What is your lowest price after-dinner coffee cups in that?
A. The lowest price here is $1.20. I do not know how much discount they give on them; $1.20 for a dozen cups and dozen saucers. They sell twenty per cent discount off of that.
215 Q. You have not got anything as low as fifty cents a dozen there, have you?
A. No; we have to pay far more for making them. We have to pay so much for making them. We can't sell for that.
Q. What was the style of decoration of these lowest ones?
A. I can not tell. There are so many different styles. We ha ve them decorated all over like that bronze.
Q. Point out to where you find the $1.20.
(The witness pointed on catalogue.)
Q. What does that ought mean?
A. That is the lowest scale. No. 1 used to be the lowest scale; then they made a cheaper scale and they could not get any farther in numbers and had to make it ought.
Q. After you went into the manufacturing business, how did you come to be selling to importers?
A. I sell to them all the time.
Q. Do you sell to importers?
A. Yes, sir. They use imported goods as well as American goods.
Q. Do you not sell to jobbers?
A. Yes sir.
216 Q. The same men, as I understand you, deal in the imported that deal in the American?
A. Generally speaking. Foreign manufacturers' agents, perhaps, do not deal in American goods.

By the DISTRICT ATTORNEY:

Q. The difference in size of these two cups has been pointed out to you here?
A. Yes, sir.
Q. Please state what that is.
A. That is a cup, part of the sets I have made; that is a regular tea-cup; that particular set was made for George B. McClellan, to his order. That is one of the cups left over. I kept it as a memento. I did not bring the saucer of that.

By Mr. PRICHARD:

Q. That is chinaware, is it not?
A. Yes, sir.
Q. And that was a special order?
A. Yes, sir.
Q. That is not ordinarily known as the tea size for earthenware, is it?
A. No, sir; I would not think it was.

By the DISTRICT ATTORNEY:

Q. Do you happen to know by whom this is made and by whom it was made?

217 A. That is an English decoration. I call it after-dinner cup and saucer.

By Mr. PRICHARD:

Q. Was that a special order for somebody or was it in stock or do you not know anything about it?

A. I only know it is earthenware, probably English, and that it is an after-dinner cup and saucer, as far as my experience goes.

Q. What is an after-dinner cup and saucer?

A. It is an after-dinner cup and saucer.

Q. Is there a term in the trade known as after-dinner cup and saucer?

A. Yes, sir.

Q. In these catalogues?

A. I am not giving evidence from the catalogues. I am saying what the trade knows.

Q. The trade does not know it as after-dinner cup and saucer?

A. Cup and saucer.

Q. Do you mean it is tea cup and saucer?

A. No, sir.

Q. Do you mean to say there is a trade term of after-dinner cup and saucer?

A. Yes, sir.

218 SAMUEL W. THROP, having been duly sworn, was examined as follows:

By the DISTRICT ATTORTEY:

Q. You live in Trenton?

A. Yes, sir.

Q. What is your occupation?

A. Manufacturing earthenware.

Q. With what company are you associated?

A. The Fell and Throp Company.

Q. How long have you been in the business?

A. I have been connected with this company about six months. Prior to that I was selling goods for a little over five years.

Q. Prior to that you were not in the manufacturing business, but selling?

A. Yes, sir.

Q. Are you familiar with the articles bought and sold and used in the pottery and crockery business?

A. Yes, sir.

Q. And you are familiar with their terms?

A. Yes, sir.

Q. You recognize these articles produced by the plaintiff as being articles that are bought and sold and used in the trade?

A. Yes, sir.

219 Q. I show you the sample that is produced here, on the back of which is the word "tea drinker" cup and saucer. Please state under what name in trade is that article bought and sold and used.

A. It is used as a tea; it is called a tea, cup and saucer.

Q. Of what material are these samples produced by the plaintiff made?

A. They are made of earthenware.

Q. I show you a plate, on the back of which is the word "tea drinker." Please state under what name in trade that article is bought and sold and used.

A. It is known as a five-inch plate.

Q. I show you five mugs that have been produced by the plaintiff. State under what name they are bought and sold and used in the trade.

A. 42's mugs.

Q. I show you two plates which have been called a b c plates. Under what names are they bought and sold and used?

A. A b c plates.

Q. What is the chief use to which these articles just named by you is put?

A. Regular table use.

220 Q. Are they, or are they not, bought and sold and used in trade under the names of toys?

A. Not that I know of; I never heard of it.

Q. I show you sets of china that have been produced here by the defendant. What are these bought and sold and used as in the trade?

A. Toy tea sets.

By the COURT:

Q. Is there anything known to the trade as a toy or toys?

A. A toy tea set; yes, sir.

Q. There is such a designation by the trade as toy or toys?

A. Toy tea set; yes, sir.

Q. Do you mean to say that there is no such designation as a toy or toys?

A. No, sir; just toy tea sets.

Q. That is the only designation, toy tea sets?

A. Toy tea sets; but a man who makes toy tea sets would give a list of the cups and saucers and plates and all those things separate.

Q. I want to know whether the toy is a well-recognized term in the trade?

A. Only toy tea sets.

Q. There is no such term as toy used in the trade?

221 A. No, sir.

Q. It is toy tea sets?

A. Yes, sir.

Q. You, as a dealer, never heard the word toy used in the trade except coupled with tea sets?

A. No, sir.

Q. Then the word toy of itself, or toys, is not a term known to the trade?

A. No, sir. I have never heard it except as toy tea sets.

The COURT. From the testimony on both sides, it seemed to me to be quite clear that the word toy or toys is a trade designation, and that this case comes down to the single question: What does it embrace; does it embrace this thing or not? The other witnesses on both sides testified that toy is a trade term or trade designation, and then they all told us what they un-

derstood it to apply to, how the term is used. This witness says there is no such term known to the trade as toy, but the term is toy tea sets.

The WITNESS. All that goes to make up a tea set.

By the COURT:

222 Q. I understand you to say that there is no such designation or term known to the trade as a toy, or toys, or toy ware?

A. Toy ware would imply a toy tea set.

Q. Is there such a term known to the trade as toy ware?

A. Yes, sir.

Q. Without saying "tea set" with it?

A. Toy ware in our understanding is a toy tea set.

Q. I ask you whether or not there is a term known to the trade as toy ware?

A. Yes, sir.

Q. You say that there is such a term as toy ware?

A. Yes, sir.

Q. I understand you to say that the trade does use the term toy ware?

A. Yes, sir.

Q. And you understand that to imply only to the tea sets?

A. That is all. That is all I ever knew to be made as a toy, toy tea sets.

Q. I simply wanted to know whether the trade has that designation for anything, toy, or toys, or toy ware. Now you say it has no such designation as toy or toys, pure and simple; that it has the designation or

223 term "toy ware," and you say the only toy ware, so far as you know, to which the term is applied, is the toy tea set. Is that right?

A. Yes, sir.

The DISTRICT ATTORNEY. I also understood the witness to say when these were sold in sets that they might come within that class of toy ware; that is, for children's use.

The WITNESS. I explained what I meant by toy ware.

The COURT. You are not being asked by me for your opinion. You are being asked for the trade designation.

The WITNESS. I was going to give you my understanding of what toy tea set comprises and what toy ware is in the meaning of the trade. A toy tea set is all we know, but, at the same time, you will find that there are toy plates that go with the set that we would sell separate from the set.

Q. What kind of plates? That is the same as what set?

A. This or any set. Not only the small set, but the larger one.

By the DISTRICT ATTORNEY:

Q. If those were sold in sets, would that be a toy set or not? [Large.]

224 A. No, sir; it would not.

Q. Suppose these plates were sold in sets, would that be a toy set or not?

A. No, sir. I mean any article that goes to make up a toy tea set.

By the COURT:

Q. Like that?

A. Or larger than that.

(Witness shown set with raised flowers in box.)

The WITNESS. Like that, the teas would be listed as such. That would be a toy tea.

By the DISTRICT ATTORNEY:

Q. Even when so large as this set? [Large set in box.]

A. I have never seen a toy tea as large as that.

By the COURT:

Q. But as large as the smaller one which you had there? [Set with raised flowers.)

A. I have never seen a toy set as large as that.

Q. How about that? [White.]

A. That I should call a toy tea. It is a large one.

Q. In the trade designation, would that fall within the term of toy ware?

A. Yes, sir, I should think so; although, as I say, that is a pretty large toy.

225 Q. That is as large as you have seen?

A. Yes, sir. It may be a little larger than I have seen. It is one of those things you can not carry in your eye.

Q. The term toy ware did include larger cups and saucers and plates than those in the small tea set?

A. Yes, sir. You understand what I mean by toy ware is, what goes to make up a toy set if it is sold separately. You would call it as a class toy ware.

By the DISTRICT ATTORNEY:

Q. What was the extent of your experience in your business prior to 1883?

A. I was in business selling goods about six years—very near—prior to 1883.

Q. Do you or not know of the importation of articles similar to these produced by the plaintiff prior to 1883?

A. Yes, sir.

Q. State, if you know, under what name they were imported.

A. I only know from the fact that we come in competition with them.

Q. I have asked you to state the name under which they were imported, if you know.

A. They come in as earthenware.

226 Q. Prior to 1883?

A. Yes, sir.

Q. When was it that you first heard them called toys?

A. Since I have been at this trial here.

Cross-examination by Mr. PRICHARD:

Q. You do not know, of course, what the people call them on their invoices?

A. No, sir.

Q. You only infer, from the fact that they were able to sell in competition with you, that the Government let them in as earthenware?

A. Yes, sir.

Q. You have said that that would be known in the trade as a tea? [Colored cup.]

A. Yes, sir.

Q. Is it not true that the word "tea," without anything else, means a cup of a certain size?

A. No, sir.

Q. Have you one of your own catalogues?

A. Yes, sir. [Producing catalogue.]

Q. I find here teas unhandled under the heads of the various ware. What size cup does that mean?

227 A. It don't mean any particular size cup. It means a tea cup, but we make various sizes.

Q. Where are your sizes here? For instance, under the head of ironstone China I find teas, St. Dennis, unhandled, $8.50. What size are they?

A. They are the regular St. Dennis tea.

Q. Is it this shape, something like that? [Large white cup.]

A. Something like that.

Q. You think it is a regular teacup?

A. It would be a hard matter to tell.

Q. The stone porcelain tea; teas, handled, $10. What size are they?

A. That is a smaller tea, thinner. About that size. [Indicating.]

Q. Pass to the C. C. ware, teas, handled, St. Dennis, $8.50. Is that the same as the other?

A. Yes, sir.

Q. "White granite ware, handled teas, $10." What are these?

A. That is white granite ware. It is the regular St. Dennis shape.

Q. I find under W. G. C. C. teas, unhandled, $4.50?

A. That is an assortment of earthenware.

Q. Teas, unhandled, $4.50?

228 A. That is the list carried out.

Q. Where do you find anywhere in here any teacups as small as that?

A. Our smallest teacup is not on the list.

Q. Why not?

A. We have just gotten up a new tea.

Q. So that up to 1889 you had no teas that were as small as that?

A. I was not in the business myself in 1889, but we do not make as small as these to-day as a great many other people. I did not go into business for myself before this year.

Q. Here is "Hotel ware, Saxon and tulip China, $10." What would that be?

A. It would be a regular Saxon cup.

Q. Bigger than that? [Cup marked tea drinker.]

A. Yes, sir.

Q. Have you got any samples of teacups here, except those made to special order, which are as small as this?

A. I have not got any of ours here. We do not make as small a tea as many people, because we do not make as fine ware as some others.

Q. The smaller sizes are usually made in the finer ware?

229 A. Fancy ware—fancy tea sets.

Q. You do not make toyware, do you?
A. No, sir.
Q. What experience have you had in the importing trade?
A. I have had no experience in the importing trade.
Q. Therefore, you do not know what goods are called by importers in their trade catalogues?
A. I only know by coming in competition with them.
Q. Did you ever hear of a toy muffin?
A. No, sir.
Q. Did you ever hear of a toy can?
A. No, sir.
Q. You have heard of toy teas?
A. I might say I had heard of a can.
Q. What does can mean? It means mug?
A. It means a mug. I do not know. I am not familiar with it.
Q. One of the Trenton manufacturers, who was here on Friday, said he made the same thing for an after-dinner coffee cup and toy tea. You do not make that at all and do not know it by that?
A. No, sir. We make no after-dinner coffees.

230 JOHN S. WILKINSON, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:
Q. Where do you live?
A. Trenton.
Q. What is your occupation?
A. Earthenware plates.
Q. How long have you been in the business?
A. Since I was about fourteen years old.
Q. How long is that?
A. I am thirty-six in November. That would be twenty-one years.
Q. Where did you learn your trade?
A. Staffordshire Potteries, England.
Q. When did you leave England?
A. In 1881.
Q. You recognize these articles here as being articles that are made in the earthenware business?
A. Yes, sir; in the earthenware trade.
Q. I show you a plate which is marked "tea drinker." Please state, if you know, under what name is that article bought and sold and used.
A. It is made as a five-inch muffin or plate, a five-inch plate.
Q. Have you ever heard it called in trade a toy?
231 A. No, sir.
Q. Either in this country or in England?
A. No, sir.
Q. I show you a cup and saucer upon the back of which is the word "tea drinker." Please state under what name is that bought and sold and used in trade.
A. I could not tell you what it is bought and sold and used as. I know what it is made as. It is made as a tea.

Q. Tea what?

A. Teacup and saucer.

Q. These plates which have been called A B C plates, you are familiar with them?

A. Made many a thousand dozens; that is the five or six inch plate.

Q. Under what name are they bought and sold and used?

A. If you go into the stores in the old country you will ask for a child's fancy dinner plate. That is what they are known as. They are used as dinner plates on the table.

Q. I show you five mugs; are you or not familiar with these articles?

A. Yes, sir; these are Tom and Jerries and mugs.

Q. What are they called?

232 A. 42's, I guess. They are a forty-two mug. That is in the making.

Q. What is the name in trade, as you have known them bought and sold and used?

A. If you would go into a store in England you would go in for a child's tea; you would not go in for toys for these things.

Q. Have you ever heard these called toys, either in England or in this country?

A. No, sir.

Q. I show you these sets of china produced by the defendant. What are they called in trade? (Small set in box.)

A. Those would go for toys. They are known as toys in the old country as well as here.

Cross-examination by Mr. PRICHARD:

Q. You come from Staffordshire, do you not?

A. Yes, sir.

Q. Have you ever been connected with the Brown Hill?

A. No, sir.

Q. You know where it is?

A. Yes, sir.

Q. You have heard the word toy can, have you not?

A. Yes, sir. Not such toy cans as those samples produced here; they were smaller.

233 Q. You have heard of the toy muffins?

A. No, sir. I have heard tell of the four-inch muffins that go along with the after-dinner set and those things.

Q. I show you the price list of the Brown Hill Pottery Company. It says four, five, six, and seven inches.

A. I never heard tell of them.

Q. Look at it. Toy cans.

A. Thirty-six to the dozen. Toy muffins four, five, six inches; I never heard tell of the toy muffins passing four inches. That is four-inch. (White sample.)

Q. What is a four-inch muffin?

A. That is a muffin. Muffins and plates are similar.

Q. This Brown Hill pottery is a large concern?

A. Yes, sir.

Q. Tell the jury how there happened to be the term that you do not know anything about introduced in this catalogue.

A. I do not know unless it is put in to kill our business here.
Q. There is some motive, you think?
A. There is some motive.
234 Q. What do you understand the thirty-six toy cans to mean?
A. A very small article.
Q. What do you mean by 36 and 42?
A. That is the size as designated in the mug. If they give you an order they will say they want so many 36's, so many 42's, and so on.
Q. What do you mean by 36?
A. The higher the number the smaller they get. A 42 is smaller than a 36.
Q. So that a toy can 36 to the dozen would be bigger than toy cans 42 to the dozen?
A. Yes, sir.
Q. I show you general price list of English earthenware trade made in 1873 and revised in 1877, with toy cans 36 to the dozen.
A. That is the number of pieces. That is not all the size. That is what they call a long dozen.
Q. If this was a 42, what would a 36 be?
A. If that is a 36 the smallest would come at 42.
Q. So that 36 would be a bigger mug than 42?
A. Yes, sir.
Q. I show you again this price list which has toy can 36 and ask you what is meant.
235 A. That is 36 to the dozen. It tells you there plain enough at three shillings.
Q. What did you understand 36 to mean?
A. There are 12 to the dozen and 36 to the dozen.
Q. This is 42 to a dozen?
A. No; they are not that big. It is dozen plain enough here. That is what they call a long dozen.
Q. What do you mean by 42?
A. That is not a 42 mug.
Q. You said a little while ago it was.
A. I said that would be about 36 in size. I said the smaller ones would run to 42. The higher the number the smaller the size.
Q. Do you mean 36 to the dozen?
A. No; I mean nothing about the dozen. I mean the size.
Q. This 36 to the dozen do not mean it is a 36 mug?
A. No, sir; the cups and saucers in the old country are counted 36 to the dozen.
Q. And I suppose cans or mugs also, are they?
A. I suppose so.
Q. Do you not know?
A. I do not happen to make those things. I am more in the plate line and saucers. I am a plate-maker by trade.
236 Q. Did you not make mugs and toys when you were in England?
A. Yes, sir. There are mugs made with moulds. Those go by size.
Q. What position did you fill in the potteries in England?
A. A plate-maker.

Q. Did you have anything to do with the buying and selling of the goods?

A. Only when I went to purchase for my own use.

Q. Do you make toy teas here?

A. No; I don't make any teas at all.

Q. You do not make anything but plates?

A. Plates.

Q. You think there was only a difference in size between a toy muffin and any other muffin; that the size was the only difference.

A. The size certainly. That is what we are governed by, the size. When we make plates two and a half in the old country—you have some small ones there—they are used as cup plates. There are two inch and a half, and so on, and go up to an eight-inch plate. There is also on there (white) which is known as a seven-inch muffin or plate.

237 Q. All up to a four inch you call a toy muffin?

A. I don't know. They are not called toy muffins in the making. You might sell it in the selling prices, but in the making it would not be known.

Q. You do not know how they are known in the selling, do you?

A. When it comes to toy plates, they do not go up to six, seven, and eight inch dinner plates.

Q. But you do not know about the selling department?

A. I don't know anything about the selling department. If I was going to purchase, I would know what I would have to pay for them.

ISAAC YATES, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. You live in Trenton?

A. Yes, sir.

Q. What is your occupation?

A. Potter.

Q. How long have you been in that business?

A. Twenty-eight years.

Q. In this country and anywhere else?

A. About ten years in this country.

238 Q. Before that, you were where?

A. Staffordshire, England.

Q. Look at these samples produced by the plaintiff, and state whether or not you recognize them as being earthenware articles, bought, sold, and used in the trade. Are they or are they not?

A. Certainly they are.

Q. You know the names under which they are known in the trade?

A. I know the titles under which they are made.

Q. I show you a plate marked "tea drinker;" please state under what name that goes in the trade.

A. A five-inch plate in this country.

Q. How about in England?

A. A five-inch muffin.

Q. I show you a cup and saucer which apparently belongs to that same set. Under what name does that go in the trade?

A. A fancy teacup and saucer.

Q. Have you or not ever heard these articles called toys in the trade?
A. Never.
Q. I show you five mugs that have been produced here by the plaintiff. State under what name they go in the trade.
239 A. Those are mugs—ordinary table mugs—Tom and Jerry mugs, if they are decorated.
Q. What are those mugs (showing samples)?
A. I call them all Tom and Jerry mugs.
Q. What is that called (mug with A B C D E F on)?
A. That is a child's mug. It is a common earthenware mug.
Q. What is the chief use to which these articles I have shown you are put?
A. Ordinary table use.
Q. I show you two plates which have been spoken of as A B C plates. What is the name by which they go in the trade?
A. Five-inch and six-inch plates.
Q. Both in this country and in England?
A. They call them muffins in England in the making department.
Q. I show you these samples of earthenware goods produced by the defendant. What are they called in the trade (small sets in boxes)?
A. Child's playthings—child's toys.

Cross-examination by Mr. PRICHARD:

240 Q. What did you do in England? Did you manufacture for yourself?
A. No, sir.
Q. What position did you hold there?
A. A platemaker.
Q. Do you know anything about the names under which these goods were sold in the importing trade?
A. No, sir. Nothing whatever.
Q. You have said that a Tom and Jerry mug is a decorated mug. One of the gentlemen who preceded you on the stand called these Tom and Jerry mugs (white mug)?
A. Any one who wanted a cheap mug could have those. Of course, you have to pay for the decoration.
Q. Have you a catalogue?
A. No, sir.
Q. You are not engaged for yourself?
A. No, sir; I work as a potter.
Q. Do you know anything about buying and selling goods in this country?
A. No, sir.
Q. Do you know anything about the buying and selling department of the goods?
A. No, sir. Only the making.

241 JOSEPH NIXON, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. You live where?
A. In Trenton.

Q. What is your business?
A. Pottery business.
Q. How long have you been in the business?
A. About thirty-six years.
Q. Where?
A. In England, and two years here.
(Competency of witness objected to.)
The COURT. For what it is worth you may take his testimony, but it is not an extensive knowledge. He has been employed about the pottery, where earthenware and other wares were manufactured, and he may certainly testify, if he knows, what in the trade of manufacturing these articles they were called. It goes to the jury for what it is worth.
(Objection overruled. Exception for plaintiff.)

By the DISTRICT ATTORNEY:

Q. Look at these samples, produced by the plaintiff, and state whether or not you recognize them as articles bought, sold, and used in the earthenware trade.
A. Yes, sir.
242 Q. Do you or not know the names by which these articles go?
A. Yes, sir.
Q. I show you a plate, on the back of which there are the words "tea drinker." State under what name that article goes in the trade.
A. A five-inch muffin, in England.
Q. In this country, under what name?
A. Five-inch plate.
Q. I show you a cup and saucer, which apparently belong to that set, with the word "tea drinker." Under what names do they go in the trade?
A. Tea cup and saucer.
Q. In this country?
A. Yes, sir; and the same in the old country.
Q. I show you five mugs; state, if you know, the names under which these goods are known in the trade.
A. As mugs; ordinary mugs.
Q. Both in this country and in England?
A. Yes, sir.
Q. I show you two plates, called A B C plates; under what name do they go in the trade?
A. Five-inch and six-inch muffins.
Q. How about in this country?
A. The same, plates.
243 Q. What is the chief use to which these articles are put?
A. Regular common table use.
Q. Have you or not ever heard them called toys in the trade?
A. No, sir; never.
Q. I show you samples produced by the defendant. State under what name they go in the trade.
A. Children's toys.

By the COURT:

Q. Is there anything known to the trade as a toy?

A. Only those (small).
Q. Is there anything that is designated a toy or toys?
A. Not that I know of.
Q. But there is a toy, what?
A. Toy tea set. I have made them myself when I was a boy.
Q. You never heard the word toy except in connection with the toy tea set?
A. No.
Q. Never heard the word toy?
A. No, sir.

244 Cross-examination by Mr. PRICHARD:

Q. What position did you hold in England?
A. I was a tea cup maker.
Q. In this country what position have you?
A. I make tea cups here, but I am making what they call pie dishes in the Crescent Pottery.
Q. Who are the proprietors?
A. Messrs. Cook & Hancock.
Q. Who asked you to come down here?
A. Mr. Wilkinson.
Q. What experience have you had in buying and selling in the trade of these goods?
A. None whatever.

JOHN MEHLING, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. Where do you live?
A. Trenton, New Jersey.
Q. What is your occupation?
A. Warehouseman and shipping clerk in the pottery business.
Q. How long have you been in the pottery business?
245 A. Sixteen years.
Q. In this country?
A. Yes, sir.
Q. Anywhere else?
A. No, sir.
Q. What other positions have you had in connection with the pottery business?
A. That is all.
Q. Do you recognize these articles that have been produced here by the plaintiff as being articles that are used in the pottery trade?
A. Yes, sir.
Q. I show you a plate that is marked "tea drinker." Please state, if you know, under what name is that bought and sold and used in the trade.
A. That is a five-inch plate.
Q. I show you the cup and saucer belonging to the same set. Under what name is that known?
A. That is a tea cup and saucer.
Q. Have you ever heard these called toys in the trade?
A. No, sir.

Q. I show you five mugs. State, if you know, under what name are they bought and sold and used in the trade.

246 A. In the trade we would call them 36 mugs.

Q. Have you or not ever heard these called toys in trade?

A. No, sir.

Q. I show you two plates which have been called A B C plates. State, if you know, under what name they are bought and sold and used in the trade.

A. Five-inch A B C plate and six-inch A B C plate.

Q. Have you or not ever heard them called toys in the trade?

A. No, sir.

Q. What is the chief use to which these articles are put?

A. Table use.

Q. They are of course earthernware?

A. Yes, sir.

Q. These samples that have been produced by the defendant, under what name are they known in the trade? (Small.)

A. I should call them a toy tea set.

Q. And those are toys, I believe?

A. Yes, sir.

Q. So known in the trade?

A. Toy tea sets.

247 Cross-examination by Mr. PRICHARD:

Q. For what houses have you been shipping and warehouse clerk?

A. For the Willits Manufacturing Company in Trenton.

Q. Anybody else?

A. No, sir; not in the pottery business.

Q. What opportunities have you had for knowing under what names these things are bought and sold in the trade?

A. By being around the store selling the goods.

Q. Do they make A B C plates?

A. No, sir; not those goods, but five and six inch plates.

Q. That is the only means you have of knowing, by being around Willit's store?

A. And different stores.

Q. You have never been connected in the pottery business with any other house than Willits?

A. No, sir.

Q. There you are shipping clerk?

A. Yes, sir.

Q. Do you make any A B C plates?

A. No, sir.

248 Q. How is it you swear what these things are known in the trade as when you never had any experience in making these?

A. I said the size is five and six inch plate. That is what I meant.

Q. What do you mean by 36's mugs?

A. That is the size.

Q. To the dozen do they come?

A. Here twelve to the dozen.
Q. Do Willits make anything like these?
A. They make a small tea; yes, sir.
Q. Do you know what price it is sold for?
A. List?
Q. Yes.
A. I believe I do.
Q. Have you got a list with you?
A. No, sir.
Q. What are they sold for?
A. $10 a gross list handled.
Q. Plain or printed?
A. Plain.
Q. Do they make a decorated tea?
A. Yes, sir.
Q. What is the lowest decorated teas?
A. The teas that we decorate are principally for dinner sets and tea sets.

By the COURT:

Q. What price?
249 A. They vary from $3.50 up, according to the decoration.
Q. Do Willits make any mugs with A B C and donkeys and things of that sort on?
A. No, sir.
Q. What sort of mugs do they make?
A. The plain white mug like that.
Q. Do they make toy ware?
A. No, sir; not at present they do not.
Q. Did they?
A. They did some years back.
Q. How far back?
A. Three years back.
Q. What sort of toys did they make?
A. Small toy tea sets.
Q. Anything else?
A. No, sir.
Q. Did not make toy teas?
A. Make toy teas to go with toy tea sets.
Q. Did they sell the toy teas by the gross?
A. Very few, but sometimes they were sold that way.
Q. They were so listed on their catalogues, were they not?
A. I believe you will find them listed on their catalogues, yes, sir?
250 Q. Is that about the size? (White.)
A. That is about the size.
Q. What is there to indicate that that is intended for children?
A. I suppose going in the toy tea set.
Q. Suppose a man ordered a gross of toy teas from you like these. What would there be to indicate that they were intended for children?
A. I could not say.

WILLIAM LOVE, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. You live where?
A. Trenton, New Jersey.
Q. What is your occupation?
A. Pottery manager.
Q. How long have you been in the business?
A. Forty-two years.
Q. Where have you been in the business?
A. Staffordshire, England.
Q. How long have you been in this country?
A. A little over three years.

251 Q. You are familiar with the terms used in the pottery trade under which articles are bought and sold and used, are you not?

A. I am, generally. That came under my notice as foreman and manager.

Q. You will notice these articles produced here by the plaintiff. State whether or not you know the names under which they are bought and sold and used in the trade.

A. I can tell you.

Q. I show you these plates, on the back of which are the words "Tea drinkers." Under what name is that bought and sold and used in the trade?

A. About five-inch muffin or plate. You take it either way.

Q. Do you mean in this country and in England, too?

A. The common term "muffin" is used more in England than it is used here.

Q. Look at the cup and saucer belonging to that set. What is the name under which that goes?

A. That is a common teacup, common terms called teas in England, from time back, as I can remember; Norfolk tea, London tea.

Q. What is this?
A. A London teacup.

252 Q. Have you or not ever heard these articles called toys, either in this country or in England?

A. No, sir.

Q. I show you five mugs. Please state under what name they go in the trade.

A. Ordinary mugs. Mugs, the sizes to suit the taste of people.

Q. Have you or not ever heard these called toys, either in England or in this country?

A. No, sir. They are far from toys.

Q. I show you two plates which have been called A B C plates. State what those are in the trade.

A. Five-inch muffins or plates.

Q. What is the chief use to which these articles which have been shown you are put?

A. General tableware use.

Q. I show you three samples produced by the defendant. What are those called in the trade?

A. Toys.
Q. What are they used for?
A. Children to play with.

By the COURT:

Q. Are they the only things that are called toys in the trade?
A. Yes, sir; those are the only things that are called toys.

253 Cross-examination by Mr. PRICHARD:

Q. What connection did you have in England with the buying and selling department?
A. None at all.
Q. What position did you hold there?
A. I was overlooking for eight years, and I was foreman before I come to this country.
Q. What position have you occupied in buying and selling in this country?
A. None at all.
Q. Do you know what a toy muffin is?
A. I should think I did.
Q. What is a seven-inch toy muffin?
A. There is no such thing as seven-inch toy muffins.
Q. Do you know what a toy can is?
A. Yes, sir. We have toy cans. In the printing department we have a toy can that is printed.
Q. Like that sample?
A. Smaller than that; about an inch and a quarter across.
Q. What are they printed with?
A. Underglazed colors.
Q. What kind of illustrations are on them—letters or animals?
254 A. Anything, almost, to please a child.
Q. There is such a thing as toy cans that you have heard in the trade?
A. We call them as such.
Q. Did you not say to the judge a few minutes ago that the only thing you ever heard called toys were the toy tea sets?
A. No, sir.
Q. There are other things that you have heard in the earthen ware called toys?
A. There are.
Q. We have two. Let us get the rest. We have toy tea sets and toy cans. What else?
A. When I was a boy I made toy toilet sets.
Q. What else?
A. Nothing else than the toilet sets and tea sets.
Q. Did you ever hear of toy plates?
A. There are toy plates goes with the toy tea set.
Q. You never heard it except in connection with the toy tea set.
A. No.
Q. With what firm are you in this country?
A. The Willits Manufacturing Company.
Q. They do not make the A B C plates?

A. No, sir.

255 Q. Do they make any teacups as small as that (colored)?

A. Something similar.

Q. As small as that in this kind of ware?

A. It might be as small.

Q. Look at that and tell me whether they make any teacups as small as that.

A. Not quite so small.

Q. You said this was a London tea?

A. That is a term we have in England. We call them London tea.

Q. If you sent to a man for so many gross of London teas and nothing else, he would send you a cup a great deal larger than that, would he not?

A. No, sir; that is about a London tea.

Q. Is not an ordinary London tea a very much larger cup than that?

A. As a general thing a teacup will vary in size.

Q. Did you ever see a London tea that was as small as that? This one which you say is a London tea?

A. That is teacup, anyhow. I can't say exactly whether a London tea would be as small as that.

256 JOSEPH WILLITS, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. You live in Trenton, New Jersey?

A. Yes, sir.

Q. You are in the pottery business?

A. I am.

Q. With what concern?

A. The Willits Manufacturing Company.

Q. How long have you been in the business?

A. In the pottery business ten years, or a little more.

Q. Before that in what business were you?

A. I was in the importing trade in earthenware—importing English earthenware since 1864, and from 1864 to 1878.

Q. In this country or in England?

A. Here.

Q. You have always been in this country in business?

A. Yes, sir.

Q. I show you these samples that have been produced by the plaintiff. You recognize them as earthenware articles?

A. I do.

Q. Are you or are you not familiar with the names under which they are bought and sold and used?

257 A. I am.

Q. I show you this plate, on the back of which are the words "tea drinker." Please state, from your knowledge of the business, under what name that article is bought and sold and used in trade.

A. It is a five-inch plate here. In England it would be called a five-inch muffin. I have no doubt that that was invoiced as a five-inch muffin. It is called a five-inch plate here and in England a five-inch muffin.

Q. I show you the cup and saucer which apparently belongs to that set. Under what name is that known in trade?

A. That is known as a tea here.

Q. Tea what?

A. Tea cup and saucer. It is a size known in England as a Norfolk tea. Norfolk is the size.

Q. I show you five mugs. State, if you know, the names under which these go in the trade.

A. They are mugs.

Q. They are called mugs?

A. They are called mugs.

By the COURT:

Q. Anything else?

258 A. The different kinds of mugs are designated by differentt names?

A. But not toy mugs.

A. I do not know as I ever saw toy mugs as large as those. They make a mug that is sometimes called toy mugs and sometimes toy cans. These seem to me to be a larger size.

By the DISTRICT ATTORNEY:

Q. The can is this shape, is it not.

A. Yes, sir.

Q. Is the toy can you speak of as large or small as that? (Smaller size mug.)

A. I should think that was about the size of a toy can.

Q. As far as you know, what is the name given to these?

A. The size of those would be 36. They would be called mugs. There is one would be called a luster mug.

Q. Under what name are these plates, called A, B, C plates, bought and sold and used in the trade?

A. A, B, C, or after-dinner plates.

Q. Have you ever heard them called toys in the trade?

A. I do not remember that I have. I may possibly have done so, but I do not think I have.

259 Q. What is the chief use to which these articles are put?

A. For table use.

Q. You are familiar with the importations of similar articles prior to 1883 into this country?

A. Yes, sir.

Q. State, if you know, under what name articles similar to these were imported into this country prior to 1883.

A. They were imported as earthenware.

Q. What is the extent of your knowledge as to that point; is it large or small?

A. I think I am warranted in saying it is large.

Q. I show you these articles produced here by the defendant; what are they called in the trade? [Small sets in boxes.]

A. Toy tea sets.

Q. These are called toys?

A. Yes, sir.

Q. What the trade knows as toys?
A. Yes, sir.

By the COURT:

Q. Does it know anything else as toys?
A. Yes, sir.

Q. What else?

260 A. Little dogs and cats and various little articles that are of no possible use as far as domestic use is concerned.

Q. And cannot be used?
A. Cannot be used; they are purely and simply toys.
Q. Those are the only things that the trade calls toys?
A. Yes, sir.
Q. These tea sets and the other little images that cannot possibly be used for any useful purpose you say are the only things known to the trade as toys?
A. All I know in the trade as toys.
Q. Is all you know that the trade calls toys?
A. That the trade calls toys.
Q. Have you one of your price lists here?
A. No, sir; I have not. The price lists are substantially the same.

By the DISTRICT ATTORNEY:

Q. There is the word toyware here that is used in this price list.
A. I should think one of them was like ours. There is an item called toyware on this catalogue which I hold in my hand.
Q. Explain what that means to the trade.

A. It means the component parts of a toy tea set.

261 BY THE COURT:

Q. That is what it means?
A. Yes, sir.
Q. The component parts of a toy tea set like this? (Small set in box.)
A. No, sir. (After looking at sample.) That cup came out of our factory. That is a toy tea set as meant on our catalogues. I mean as a toy tea.
Q. Then the word "toy" does apply to something that may possibly be used?
A. These are made for children's use.
Q. Then it does apply to the images and to the little nonuseful tea set, and also to a useful tea set, such as you now describe.
A. No, sir; I do not consider this as a useful tea set. The pieces are not large enough for use.
Q. You would say that is not large enough for a child's use?
A. No, sir; I should think not.

By the DISTRICT ATTORNEY:

Q. Of how many pieces does this set to which this applies consist?
A. It has six cups, six saucers, six plates, teapot, sugar, cream, and bowl.

262 Q. When this it sold is it or not sold just as that article is sold, in sets? (Small set in box.)

A. In sets.

By the COURT:

Q. Is it never sold in the cup, saucer, and plate?

A. No, sir.

Q. That is a sample of a specimen of the ware which is referred to in the catalogue which you have in your hand as toyware?

A. I would say our catalogue is printed in these identical words and it refers to that.

Cross-examination by Mr. PRITCHARD:

Q. Your catalague has on it, just as this does, toy teas, per gross?

A. I presume it does. I have no doubt it does.

Q. Why, if these things were only intended for toy tea sets, did you sell them to the trade in gross?

A. We do it the same as any other business.

Q. Because there is a demand for them?

A. I suppose parties want to buy them.

By the COURT:

Q. That is, you do not put them up in sets, but you sell them in gross?

A. To some extent. Not a large extent, but to some.

263 Mr. Prichard handed witness white cup with blue rim, identified by the witness as one of witnesses "toy teas," and cup marked "tea drinker," and requested him to pour water from one of the cups into the other and to see what the difference in size was.

The WITNESS. I observe that.

Q. They are about the same size?

A. I would not say the same size.

Q. Try the experiment.

The witness did as requested, stating: They are substantially the same size.

Q. This thing, as I understand you to say, you make as a toy tea? (Cup with blue rim.)

A. Yes, sir.

Q. This thing we make you say is not a toy tea?

A. I say that is a Norfolk tea.

Q. What is the ordinary size of the ordinary Norfolk tea?

A. There is a Norfolk tea. (Tea drinker.)

Q. Is not this a Norfolk tea? (White).

A. No, sir.

Q. You think this is the size of a Norfolk tea (tea drinker)?

A. Yes, sir; I think so.

264 Q. One of the gentlemen who was on the stand a while ago said this was a London tea.

A. He was mistaken.

Q. He said he was a tea cup maker.

A. No, sir; I think not. I understood him to say that that was a Norfolk tea. That is a smaller than a London tea.

Q. Do you see any other Norfolk teas about here?

A. No, sir; I do not.

Q. Are not Norfolk teas made in America?

A. No, sir. We do not make them. I do not know what others do. I am not prepared to say that no one makes them. We do not.

Q. They are not the ordinary size that is used on the table for teas?
A. They are not the ordinary size used in this country.
Q. You do not make A B C plates either?
A. No, sir.
Q. Do you know what a seven-inch muffin would be in the trade?
A. I never have seen one.
Q. Which one of these would be a toy can?
A. That would be a large toy can (referring to mug with gilt edge).
Q. What would you say as to that? (Sample.)
265 A. That is still larger.
Q. That is a toy can, is it not?
A. That is ornamented as a toy can. (Referring to cup with A B C on it.)

By the COURT:

Q. Would it be called a toy can?
A. I never have imported any toy cans as large as that, but with the same style of decoration.

By Mr. PRICHARD:

Q. After all, is it not very often the decoration which determines whether a thing is a toy can or not, and not the size?
A. I should think the size was the governing element. In the mugs I should say the size was the governing element.
Q. What is the difference between a butter plate and a toy plate?
A. That is a cup plate you have in your hand. I would like to qualify that answer. That plate may be used as a smaller size toy tea set.
Q. That is not what it is made for, is it?
A. Probably not.
Q. What distinguishes it from a toy plate?
A. I guess nothing very much.
266 Q. Yet you had no hesitation in telling me what it was; that it was a cup plate?
A. I had none whatever.
Q. That is not a toy can, is it? (White.)
A. No, sir.
Q. What do you call it?
A. That is a coffee can.
Q. You have no hesitation about that?
A. No, sir.
Q. You have seen toy cans quite as small as that?
A. Yes, sir; quite as small.
Q. Why do you say that is not a toy can?
A. Because it is made for the purpose——
Q. Of grown people?
A. For grown people.
Samples produced by the Government offered in evidence.
Testimony closed.
At one o'clock the court took a recess until two o'clock.

2 P. M.

267 Mr. PRICHARD. I do not propose to offer any written points. I ask the court to instruct the jury that it is simply a question of trade designation.

The district attorney read the first, second, third, fourth, fifth, sixth, seventh, and eighth points presented by the defendant.

The DISTRICT ATTORNEY. The eighth point has been taken from the case, I understand.

The COURT. Several of those points I will hear you about, but as applicable to the proofs on both sides of this case, are irrelevant.

The district attorney read the ninth point.

The COURT. That was passed upon by Judge McKennan in the case against Hartranft. It was drawn in almost that identical language. I will hear you about it, but I will say this to you in advance: That it really has seemed to me that the testimony here agrees in this, that the words toy, toys, and toy ware are trade designations in this branch of commerce, and that they are synonymous; that they are trade language, and that they signify the same thing. If that is so, then is there any question here of fact but the question what does this language embrace, because if there is such a trade language then the language of the
268 statute is to be given the same meaning precisely that the language has in this branch of commerce, and if that is so the question for the jury would be what is embraced by this language as incorporated and used in this branch of commerce? Does it embrace these articles that the plaintiff claims to import as toys or does it not? If these articles are not toys or toy ware—the same signification—within the meaning of these terms as used in this branch of commerce then they are properly taxed. If they are toys or toy ware within the signification attached to these terms in this branch of commerce then they are improperly taxed and the plaintiff can recover.

Therefore I am not able to see how several of these points can be applied to this case.

Of course if there was contradiction in the testimony upon the first point, whether this is commercial language, it would be for the jury to say. If the jury found that it was not the language of the trade then it would be for the court to define what is the meaning of this language as used in the statute. The court would have to say to the jury that in that
269 event the language is to have the signification attributed to it in ordinary speech—the signification, if you please, found in the dictionaries, because there is no evidence that that is not the signification of common speech. Then it would be for the court to say what is a toy or toy ware within that signification, and it would be for the jury to find, as matter of fact, whether these things were toys within that signification; but inasmuch as the witnesses on both sides all testified that this is commercial language why should we bother ourselves about any questions such as I have just indicated? They all testified that this is language known to the trade, and as it seems to me the only question open is what does the language embrace. Does it embrace such articles?

On the one hand you have witnesses testifying it does and on the other hand you have witnesses testifying it does not, and from this evidence and whatever else may be found evidence, the jury must determine.

Should we bother with any other questions? Your points raise a great many other questions. I must answer them. I say that most of
270 them were embraced in the case that was tried before Judge McKennan, the record of which I have in my hand.

The testimony there and here was not quite the same, and these points were answered interchangeably back and forth through and through. It is important to get this case before the jury in the simplest form in which it can go before them. I may be mistaken and will hear counsel about it, but it does seem to me that that is all there is in this case.

This is commercial language according to all the witnesses on both sides, and I shall have to tell the jury to say so. The only question is: What does it embrace? because, being commercial language, Congress is supposed to have spoken in the sense of commercial language. So you considered the case in your examination of witnesses. You exhibited these things and asked the witnesses whether or not these things were covered by that term, whether they were known in the trade as toys or whether the term applied to something else. It was a logical shape in which to present it.

The DISTRICT ATTORNEY. There is no difference of opinion be-
271 tween the counsel for the Government and the plaintiff as to the fact that there were toy tea sets at the time of the enactment of this statute. It is claimed by the Government that what were toy tea sets at that time were these small articles submitted here.

The COURT. That is right. Of course we are looking at the question in the light of things as they existed at the time of the enactment of the statute, and not subsequently. All the witnesses admitting that the terms toy and toyware were terms of commerce, known to all persons, used by all persons in this trade, the question is what did the terms embrace at that day, not at some subsequent day, and did it cover*ed* these things?

I will answer all the points you want answered. I did want the case to go to the jury in such a way that we will get a verdict that may be rendered without any embarrassment. I will pass upon every point you want passed upon, but the reading and passing upon points, if they are not entirely relevant, tend to embarrass the jury. I do not see how in this case we can reach the question, what is the meaning of the word toy according to the common acceptation of that term?

272 The DISTRICT ATTORNEY. The case of Arthur v. Swan, with which your honor is familiar, in 96 U. S., where the Supreme Court uses this language: "Congress is presumed to have used words and language according to their common acceptation and according to the common understanding of the meaning of these words"——

The COURT. That is qualified in the most emphatic way—not in the same case probably—by this language: "Except where it is shown that the language used by Congress is the language of commerce, and, whenever that is so, Congress is supposed to have spoken in the language of commerce."

The DISTRICT ATTORNEY. There can not be any dispute about this fact, that there is such a thing known as decorated earthenware, earthenware, crockeryware, and all that sort of thing. It occurred to me that when Congress used the word "toys" it used it according to the common understanding of the meaning of that word. I speak of my own understanding on that subject, which, I take it, is that of everybody else, that the word "toy" means something for the diversion of children.

273 The COURT. If we reach the question: "What is the common meaning of the word 'toy?'" what is the meaning of the word as used in common speech or outside of common speech? we probably will not disagree.

The DISTRICT ATTORNEY. It does not seem to me in recalling this evidence that there is a conflict of testimony on that point, as to whether these things are known as toys or as to whether there was such a thing known as toys in the earthenware trade. Some of the witnesses say there was such a thing known as toy tea sets.

The COURT. I do not remember a witness who does not say, either on his examination in chief or acknowledge it in cross-examination plainly, if not in positive words, as thoroughly as if he used positive words, that such a thing as toy or toyware was well known to commerce before 1883. I would have to say to the jury that, in view of the evidence, it must be taken as a fact that at the time of the enactment od this statute there was such a denomination of ware or articles in this branch of commerce as toy or toyware, well known at that time.

274 The DISTRICT ATTORNEY. I think, as a matter of fact, that in making that statement your honor will be entirely correct, because I concede these little articles are toy tea sets.

The COURT. Then the question is on all the testimony how much further it goes or whether it goes any further.

The DISTRICT ATTORNEY. Your honor spoke about the ninth point, which we submitted as follows:

"(. Under section 2499, as amended by the last tariff act, if two or more rates of duty be applicable to any imported article, it shall be classed for duty under the highest of such rates; so that, if you find that the articles in suit are earthenware decorated, then your verdict should be for the defendant, even if you also find that they are toys."

The COURT. I read it over, but that point, in substance and almost in language, was submitted in the case before Judge McKennan.

The DISTRICT ATTORNEY. I want to raise the question as broadly as I can. (Reading act of Congress.)

275 I do not think it can be seriously contended but what if the testimony in this case is true, that these articles are not incorporated within the meaning of the tariff act. They are not particularly mentioned and there is not a specific tax imposed upon toy tea sets or toy mugs or toy cups and saucers, or anything of that kind. There is a tax imposed upon earthenware and crockeryware of various kinds. It has been admitted by every witness that has been called, whether by the defendant or the plaintiff, that these are crockeryware, pure and simple. On the other hand, it is contended by the witnesses of the plaintiff that these are known as toys. Assuming their testimony to be true, it does seem to me that we are brought face to face with just such a case as was contemplated by Congress when they enacted that clause.

Here are articles that are not spoken of as toy tea sets or toy mugs or toy particulars, whatever they may be, but they are decorated earthenware, they are earthenware. Of that there can be no doubt. On the other hand, it is claimed that they are toys. Assuming that testimony to be true, you are brought face to face with a proposition that a

276 nonenumerated article resembles two particular classes mentioned in the tariff act. If I am right on that contention, it does seem to

me that the tax should be imposed upon these articles which is the highest.

The COURT. That is a question of law and takes the case from the jury. I will reserve that, inasmuch as we need not pass upon it in submitting the question of fact to the jury. You will have control of the case on application for a new trial.

The DISTRICT ATTORNEY. May I add a word by reference to the case of Greenleaf v. Goodrich on the other point as to the use of the principal of laws to trade designation, opinion by Judge Strong, 101 U. S.? (Opinion read.)

That case was decided in 1879. In connection with it we have to make this further suggestion, that the word toys here—and it is upon this point which appears to me the testimony of the plaintiff is vacant, namely, that unless they go further and show that the chief or dominant or exclusive use of these articles is that of a toy, then surely there is no room
277 here, taken in connection with the language of the court in that case, to bring in this trade designation. For this reason let us consider the tariff act before this, in which the word toys was used, and we beg to argue to the court that in the change that came in 1883 Congress had especially in mind what we know to be the ordinary use of the word toy, namely, as a plaything, for this reason, that in the Revised Statutes there is, of course, in this schedule B as to earthenware, and then there is in schedule sundries dolls thirty-five per cent ad valorem, the tariff section being arranged alphabetically (reading), and the word "toys" appears further on in the same connection, being indexed under the letter T, "Toys, wooden and others, for children."

What is the change when it comes to the act of 1883? It shows that Congress had peculiarly in its mind the use to which the article was to be put, and the use was to be one peculiarly for the amusement; because it takes it out of the letter T and jams it in the letter D, next to dolls. That was the point that was in the mind of Congress. (Reading under the head of sundries, toys, etc., etc..)

278 We had this in connection with the language we have read in the act, and we see that Congress had in mind the chief use to which the article was to be put was especially—not exceptionally, but especially and exclusively—for a plaything.

Of course, we agree with what the court has said, that if we take the whole testimony together—but it is upon that point, namely, that their evidence has not gone to the point that the chief use of these articles is for amusement, that I say there is not room here for the application of the principle as a trade designation; and, therefore, we have just suggested to the court that, to our minds, the turning point upon which the case runs was the chief use to which these articles were put, and it was with reference to that that this point was drawn.

The COURT. Judge McKennan was compelled to pass upon this question, and he instructed the jury very emphatically in the case referred to that if the terms were terms of trade, if this was trade language, it meant the things there involved, and they are the same things that are involved here.

The DISTRICT ATTORNEY. Not altogether.

279 The COURT. The same character. It involved the same principle and same character of articles. The judge charged the jury that the question on that branch of the case was whether or not these

things fell within the designation of toys or toyware as these designations were employed by the trade, and then the judge reserved the various points, qualifying his answers in such way as to instruct the jury that, if those were not trade terms, then they were to be taken in their ordinary signification, and stating what he understood that signification to be, and then left the jury to say whether the things involved were toys according to that signification. More time for deliberation might be of service, but we have got to dispose of the case without having materially more time.

The point made by the counsel for the Government that goes to the root of this case I reserve. Upon the evidence it is to go to the jury. It seems to me to be entirely clear that the language of the statute is, as applied to the subjects here under consideration, the language of commerce, well known and thoroughly understood to the entire trade,
280 and that Congress is therefore to be understood in this respect as speaking in the language of commerce, and that the serious question for this jury, and the only serious question, is What is the scope this language permits of as used in commerce? Is it broad enough to cover the things that the plaintiff here claims to be toys and toyware or is it narrow and does it exclude it? The burden is on the plaintiff to show that it is broad enough to cover that. If the plaintiff has failed in that, the defendant will be entitled to a verdict.

I say this now that it is important for all to understand each other at this point of the case. Counsel will address the court upon any point that they will see fit to discuss and at any length they see fit to discuss it, but as the court is now informed, unless some charge of opinion occurs, the case will go to the jury just in that way.

The DISTRICT ATTORNEY. I do not want to misunderstand your honor. As I understand your honor you will state that there is a question of fact for the jury to determine, namely, whether the articles that
281 are now in evidence may not be covered by the language used by Congress.

The COURT. The jury has nothing to do with what was meant. The question is whether or not this thing was understood by the trade to cover these things, to embrace these things, if the trade so designated those things; if, as the trade used this language, it covered these things, then the language when used by Congress covered them. Otherwise not. We are speaking now of a time prior to the adoption of this statute. What occurred since may be used by way of illustration.

282 *Charge of Court.*

GENTLEMEN OF THE JURY: The defendant asks the court to charge you on certain points, the first of which is as follows:

1st. If you believe that the goods in question are bought, sold, and used as earthen, stone, or crockery ware, and not as toys, then your verdict should be for the defendant.

That is correct.

2nd. If you believe that the articles in question on March 3rd, 1883, and prior thereto, were commercially known and designated as earthenware, and if you believe that they were not at that time described and designated as toys, then it is immaterial how they have since been known and designated, and your verdict should be for the defendant.

283 That is very true. This statute was passed in 1883, and if there was a trade designation it is the designation as of that time and not subsequently, if there was one since, that we are to determine.

3rd. If you believe that the articles in question are known as earthenware in the trade and are chiefly used as other articles of earthenware, stone, and crockery ware are used, and are not chiefly used as playthings for children, then your verdict should be for the defendant.

We can not so charge you. If they were denominated toys by the trade at that time, then it is unimportant how they were used. (Exception for defendant.)

4th. The circumstance that the articles in question may possibly be used for purposes other than household purposes is not controlling, and even if you believe that sometimes they are incidentally used by children as playthings your verdict should be for the defendant if you believe that their chief use is for household purposes and that they are not known as toys in the trade.

284 That is true. If they were not known by the trade as toys, then it is true that it is not important that they may have been used as playthings if their chief use was for household purposes; but if they were known in the trade as toys then it does not make any odds how they were used.

5th. If you find that there is no trade designation of these articles as toys, then the question becomes purely and simply one of fact, viz: what is the predominating use to which these articles are devoted, and if you believe that they are not chiefly used as playthings for children then your verdict should be for the defendant.

That is correct. The court affirms that. This assertion is all predicated upon your not finding that they are known to the trade as toys.

6th. If you believe that the articles in question are bought and sold under the names of a cup, saucer, and plate, and not under the name of toys, then your verdict should be for the defendant.

285 That probably means the same thing. If they are not designated by and known to the trade as toys, but are known simply as cups, saucers, plates, etc., then they were properly classified, and your verdict should be for the defendant.

7th. A "toy" is an article used exclusively for the amusement of children, and if you believe that the articles in question are chiefly used by children, otherwise than as playthings, then they are not toys within the meaning of the tariff act, and your verdict should be for the defendant; provided the word "toys" has no special trade meaning.

There again is the same thought. What is asserted in the point is predicated upon your not finding that the word "toys" has a special trade meaning, and the point is therefore correct. I shall have more to say that will be found applicable to it in a few minutes, when I come to define the distinction between the meaning of the word "toys" as used in common speech and the term as a trade designation, if it is a trade designation.

8th. Upon the evidence in this case, the term "toys" should not be given any technical or particular or commercial meaning, but should receive its proper signification and natural import; and if the articles in question are not "toys" in the popular and general sense of the term, but

are used for ordinary household purposes, like other articles of
286 earthenware, and if such use is predominating, and not exceptional, then your verdict should be for the defendant.

[This is true; but it is proper to bear in mind that it is predicated on the idea, although not so stated, that you do not find this term "toy" to have a trade signification.] Exception for defendant.

The ninth point raises a question of law which, for the present, the court must rule against the respondent. I expected to reserve it, but it contains the word "it" here, and while there is no question about how the case should be decided, if that point is right, the circumstances are not such as enables the court to reserve it and direct a judgment for the defendant, notwithstanding the verdict, if the court hereafter be with the defendant upon the point in the absence of an agreement between the parties respecting it, and therefore the point must be regarded as denied.

Having thus disposed of the points I will now state the case, and my views respecting it, in a connected form.

The plaintiff, having imported the merchandize here involved—consisting of cups, saucers, plates, and mugs—it was classified by the custom's officers as earthenware, and subjected to the duty imposed by the statute
287 on this class of merchandize, to wit, sixty per cent. The plaintiff claims that it should have been classified as "toys," and subjected to the duty imposed by the statute on this class, to wit, thirty-five per cent. He therefore seeks in this suit to recover the difference between thirty-five and sixty per cent, which he paid.

[The term "toys," used in the statute, is to receive the signification ordinarily attributed to it in common speech, unless the evidence shows that it has a different trade signification, that is, that it is differently used and understood when applied to such merchandize by those engaged in commerce respecting it, and had such different signification at the date of the statute, in 1883.] Exception for defendant.

The signification of the term in common speech embraces only such things as are primarily intended for the entertainment and amusement of children. It does not matter that they may be susceptible of other uses; if the predominating design and use is such amusement and entertainment, the articles fall within the signification of the term "toys," as employed in ordinary speech. If the predominating use is not to amuse, although the articles may be suitable for, and be applied to this purpose, they are not toys within the common signification as before stated; that is,
288 within the meaning of the term as employed in common speech.

If, therefore, you do not find from the evidence that the term "toy" has a different trade signification, as before explained, the criterion just indicated will guide you in determining whether the articles here involved are "toys." If, however, you find that it has such different trade signification, then the statute must be understood as using the term in this sense, and its ordinary signification in common speech before explained will cease to be of any importance in disposing of this case. That it has a well-understood trade signification, the evidence seems to put beyond doubt. The witnesses on both sides testify that the term "toy" (at the date of the statute, and for many years before) was in common use among those engaged in this branch of commerce. They (the witnesses) differ only as respects the scope of its application. The question of fact for

your consideration, therefore, seems to be narrowed to the inquiry: What is the scope of the term as thus used; or, rather, what was its scope at the date of the statute? In other words, what was then embraced within the signification of the term "toys" as employed by merchants engaged in this branch of commerce? Did it include the articles here in-
289 volved? The plaintiff's witnesses, merchants engaged in this trade, testify that it did embrace them. These witnesses are numerous, and have had large experience in the trade. If you believe them—if their statements are reliable, they settle the question; and the articles must therefore be classified as "toys," and a verdict rendered for the plaintiff, in the amount of his claim. On the other hand, a number of witnesses were called by the defendant who testified that the term as used in the trade did not, at the time referred to, and does not now, embrace these articles. That its scope was and is narrower, as they describe. Whether their experience and intelligence respecting the question are as great as that of plaintiffs' witnesses, and whether their testimony is as reliable and valuable, you must judge. The plaintiff has also placed before you numerous trade circulars or price lists containing information on the subject. From this evidence, and any other you may find in the cause bearing on the question, you must decide whether the term "toy," as used in the trade at the date of the statute, did or did not embrace these articles. If you find it did, your verdict will be for the plaintiff, as before stated. If you do not so find, your verdict will be for the defendant.

There is no place here for sympathy or prejudice.

290 [If you find that the term in question has a well known trade signification (had at the date of the statute), and that these articles fall within it, your verdict must be for the plaintiff, no matter whether the trade designation seems to you to be reasonable or not. If you do not so find, your verdict must be for the defendant.] Exception for defendant.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to did not appear upon the record, the said counsel for the defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute, in such case made and provided, this 25th day of November, A. D. 1889.

(S'd) WILLIAM BUTLER, *J.* [SEAL.]

291 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set.:

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of John E. F. Zeh, et al., vs. John Cadwalader, collector of customs, &c., No. 33, April session, 1888, on file, and now remaining among the records of the said court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 24th day of February, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsement on cover:) No. 348. John Cadwalader, collector of customs for the district of Philadelphia, plaintiff in error, vs. John E. F. Zeh, Frederick Ebeling, & Theodore Reuss, trading as Zeh, Ebeling and Reuss. 14036. E. Pennsylvania, C. C. U. S. Filed May 16, 1890.